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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

NO. 539.

THE INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

FILED JUNE 17, 1896.

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a No. 252. United States circuit court of appeals, sixth circuit. October term, 1894. The Detroit, Grand Haven & Milwaukee Railway Co., appellant, vs. The Interstate Commerce Commission, appellee. Appeal from the United States circuit court for the southern division of the western district of Michigan. Record.

1 United States circuit court of appeals for the sixth circuit. In the circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company. } No. .

To the Circuit Court of the United States sitting in Equity within and for the Western District of Michigan:

Your petitioner, the Interstate Commerce Commission, which was created and established and now exists under and by virtue of an act of the Congress of the United States entitled "An act to regulate commerce," approved February 4, 1887, as amended by an act approved March 2, 1889, and as amended by an act approved February 10, 1891, humbly complaining, showeth unto your honors that the Detroit, Grand Haven & Milwaukee Railway Company is a corporation created, chartered, and existing under and by virtue of the laws of the State of Michigan, and was at the time of the committing of the grievances hereinafter specially mentioned, and still is, a common carrier, engaged in the transportation of persons and property partly by railroad and partly by water, under a common control, management, or arrangement for a continuous carriage or shipment by its railroad and line of steamboats extending through several of the United States, and particularly was it then engaged in such business between the cities of Detroit and Grand Haven, in said State of Michigan, to and from the city of Milwaukee, in the State of Wisconsin; that its line of transportation, as above stated, then formed and still forms a continuous line to and from said cities of Detroit, Grand Haven, and Milwaukee, as well as between and through the various stations of its said line, including the cities of Grand Rapids and Ionia, in the said State of Michigan, and as such common carrier was during all the time aforesaid and still is subject to the said act entitled "An act to regulate commerce," and the amendments thereto.

2 That the said defendant was heretofore, to wit, on the 24th day of September, A. D. 1888, duly impleaded in a controversy not requiring a trial by jury as provided by the seventh amendment to the Constitution of the United States, before the said Interstate Commerce Commission upon the petition of Mary O. Stone and Thomas Carten, partners, then doing business under the firm name and style of Stone & Carten, and then and now residing at the city of Ionia, aforesaid, for the alleged violation on the part of the said defendant of the provisions of the said act entitled "An act to regulate commerce," as at large and more fully appears in and by the said petition on file in the office of the said Commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit A.

That thereafterwards, to wit, on the 8th day of October, 1888, the defendant, the said Detroit, Grand Haven & Milwaukee Railway Company, filed its answer to the above-named petition of the said Stone & Carten as at large and more fully appears in and by said answer on file in the office of the said Commission, a copy whereof is hereunto annexed as a part of this petition, the same being marked Exhibit B.

That thereafterwards, the said cause being at issue upon the pleadings aforesaid, duly came on for investigation and hearing before the said Interstate Commerce Commission, duly and legally assembled for that purpose at the city of Washington, in the District of Columbia, on the 29th day of January, 1889, when the said complainants, the said Stone & Carten, as well as the said defendant, the Detroit, Grand Haven & Milwaukee Railway Company, duly appeared by their respective officers and attorneys, and thereupon the said cause proceeded to hearing and determination.

That at the said hearing it was made to appear to the satisfaction of the said Commission that the said defendant had violated the provisions of the said act entitled "An act to regulate commerce," in certain respects, as was stated to have been violated by it in the said petition hereinbefore referred to as a part hereof, and thereupon, on the 26th day of April, 1890, said Commission duly and legally determined the matters and things in controversy and at issue between the said parties, and made a report in writing in respect thereof, which included the findings of fact upon which the conclusions of the said Commission were based, as at large and more fully appears in and by the report of the determination of the said Commission, on file in the office of the said Commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit C.

That thereafterwards, to wit, on the 12th day of May, 1890, upon the determination of the said cause as aforesaid, the said Commission duly formulated an order and notice in relation to the matters and
3 things stated and charged in the said petition based upon the findings and determination of the said Commission with respect thereto, agreeably to the requirements of the statute in such case made and provided, which said order now remains in full force and effect, never having been vacated, set aside, altered, modified, or changed in any respect whatever, and is now on file in the office of the said Commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit D.

That thereafterwards, on the 13th day of May, 1890, the said Commission, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of its said report in respect thereto as aforesaid, together with the order and notice aforesaid, to be delivered to the said defendant.

And thereupon the petitioner shows that it has not been made to appear to the said Commission that the said defendant had ceased and desisted from the violations of law set forth in the said report and order of the said Commission, but, on the contrary thereof, the said defendant, unmindful of its duty and of the decision and determination of the said Commission, as stated in its report as aforesaid, has, through its officers, servants, and attorneys, wholly disregarded and set at naught the authority

and order of the said Commission in that regard, and has willfully and knowingly violated and disobeyed the said order, and has from the time of the issuance and service of the said order and notice as hereinbefore set forth, hithereto wholly neglected and refused, and still does neglect and refuse, to comply with the same, to wit, at Grand Rapids and Ionia, in the district and State aforesaid, in this, that the said defendant did not within thirty days from the service of a copy of the report of the said Commission, Exhibit C aforesaid, cease and desist from the violation of law therein found, and then consisting of furnishing free cartage to and from its station at Grand Rapids for freight carried on its road, as the said defendant was in and by said order of the said Commission directed to cease and desist from furnishing, but, on the contrary thereof, has since the expiration of said thirty days continued to furnish such free cartage in violation of the order of the Commission as aforesaid.

And the petitioner further shows that soon after the expiration of said thirty days, to wit, on the 9th day of June, 1890, the said defendant forwarded to the said Interstate Commerce Commission a letter, which is now on file in the office of the said Commission, a copy whereof is hereunto annexed and made a part of this petition, the same being marked Exhibit E.

Wherefore the petitioner prays:

4 1. That a subpœna or other suitable process may issue according to the course of equity, requiring the said Detroit, Grand Haven & Milwaukee Railway Company to appear at such time and place as this honorable court may determine, then and there to make full, complete, and perfect answer to all the matters and things hereinabove stated and charged as fully and particularly as if the said company was specifically and specially interrogated in regard thereto without verifying said answer by oath, which said verified answer is hereby specially waived.

2. That upon the filing of this petition an order may be passed by this honorable court directing the method of service of notice of the pendency of this proceeding.

3. That such order or orders may be passed pending the cause as will secure a speedy hearing and determination of the matters and things stated and charged in the foregoing petition.

4. That such order or orders may be passed pending the cause as may be necessary for the prosecution of all such inquiries as the court may think needful to enable it to form a just judgment of the matters and things stated and charged in the foregoing petition.

5. That an order may be entered pending the cause granting to the petitioner a writ of injunction or other proper process, mandatory or otherwise, to restrain the said defendant, its officers, servants, and attorneys, from further continuing in their violations of and disobedience to the said order of the said Commission, and that upon final hearing such injunction may be made perpetual.

6. That a decree may be entered, if it shall seem meet to this honorable court, requiring the said defendant to pay such sum of money, not exceeding the sum of five hundred dollars, for every day after a day to be named in said decree that it shall fail to obey the said injunction or other proper process.

7. For such other and further relief in the premises as to the court may seem meet and the equities of the petitioner's cause may require.

THE INTERSTATE COMMERCE COMMISSION,

[L. S.] By EDW. A. MOSELEY,

The Secretary thereof, thereunto duly authorized.

L. G. PALMER,

United States Attorney for said District, Solicitor for Complainant.

EXHIBIT A.

To the Honorable the Interstate Commerce Commission:

The petition of Mary O. Stone and Thomas Carten, a copartnership, doing business under the name of Stone & Carten, would respectfully show unto your honorable Commission as follows, viz:

1. That your petitioners are engaged in the sale, at retail, of goods, wares, and merchandise in the city of Ionia, county of Ionia, and State of Michigan, and purchase said goods, wares, and merchandise at Philadelphia, New York, and points east of Detroit.

2. That the Detroit, Grand Haven & Milwaukee Railway Company, the defendant herein, is a corporation duly incorporated under the laws of the State of Michigan, and is a common carrier engaged in the transportation, for hire, of passengers and property, partly by railroad and partly by water, and both being under a common control and management for a continuous carriage or shipment from and to the city of Detroit, in the State of Michigan, westerly by railroad, through and across said State, to the city of Grand Haven, in said State of Michigan, thence by water or line of steamboats westerly across Lake Michigan to and from Milwaukee, in the State of Wisconsin, and that it is, as above stated, a continuous line to and from said terminal points, as well as between and through the various stations on its said line, including Grand Rapids and the city of Ionia (the place of business of your petitioners), and that it is subject to the provisions of the "Act to regulate commerce," approved February 4, 1887.

3. That the said Detroit, Grand Haven & Milwaukee Railway Company, for its services as such common carrier in carrying merchandise of all kinds and classes from Detroit to stations on its line of transportation, as above indicated, has established and published a tariff of freights and charges which makes on all freights from Philadelphia, New York, and all other points east of Detroit the same rates for your petitioners at Ionia that is charged for the same class of freights to the merchants of Grand Rapids.

4. That shipments of freight from Philadelphia, New York, and points east of Detroit, transported over the line of the defendant railway company, pass through Ionia before reaching Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids over the same line and in the same direction, the shorter being included in the longer distance.

5. That the said defendant railway company, as your petitioners are informed and believe, while openly charging your petitioners no more for the transportation of freights from Philadelphia, New York, and points east of Detroit than is charged for similar freights so consigned to the

merchants of Grand Rapids, secretly discriminates in favor of
6 Grand Rapids merchants and against your petitioners by delivering all such freights at the warehouse in Ionia and at the doors of the consignees at Grand Rapids, thus charging your petitioners and the merchants of Ionia more on freights consigned from Philadelphia, New York, and other points east of Detroit, delivered at their doors, than the said defendant railway company charges on similar shipments delivered to merchants doing business at the city of Grand Rapids. That the said defendant railway company, as a means of transportation of such freights and as an instrumentality thereof, employs under contract a system of drays which take the freight at the warehouse at Grand Rapids and deliver the same to the merchants of that city free of charge, while the same service costs your petitioners and the merchants of Ionia from ten to thirty-three per cent of the freight charges, as aforesaid, in addition thereto, so that your petitioners and the merchants of Ionia are compelled to pay for transportation from Philadelphia, New York, and points east of Detroit from ten to thirty-three per cent more than is charged for transportation by the defendant railway company for similar shipments to the merchants of Grand Rapids.

6. That the discrimination complained of is in violation of sections 2, 3, and 4 of the "Act to regulate commerce," in this, to wit:

(a) In charging, collecting, and receiving from your petitioners and the merchants of Ionia a greater compensation for service rendered in the transportation of property from Philadelphia, New York, and all points east of Detroit than the said defendant corporation charges, demands, or receives from the merchants of Grand Rapids for the like service of transportation of property under substantially similar circumstances;

(b) In giving an undue and unreasonable preference and advantage to the merchants of Grand Rapids and to the same extent subjects your petitioners and the merchants of Ionia to undue and unreasonable prejudice and disadvantage; and

(c) In charging more for a shorter than for a longer distance, over the same line and in the same direction, the shorter being included in the longer distance.

7. Your petitioners further show that they have not brought any suit in their behalf for the money of the damages for which the said defendant railway company may be liable under the provisions of said act, but have elected to adopt this procedure as the sole means of obtaining relief.

8. Your petitioners therefore pray that an investigation of these charges may be made, and if the facts are found to sustain them, that the said Detroit, Grand Haven & Milwaukee Railway Company may be
7 ordered to discontinue the free draying of freights for the merchants of Grand Rapids on merchandise consigned from Philadelphia, New York, and points east of Detroit, or to render like service to your petitioners and to the merchants of Ionia, or for such other or further relief as may be necessary to carry into effect the true intent and meaning of said act and to which your petitioners may be entitled.

(S'g'd) MARY O. STONE.
THOMAS CARTEN.

THOMAS F. MCGARRY,
Ionia, Mich., Solicitor for Petitioners.

STATE OF MICHIGAN, *County of Ionia, ss:*

Personally appeared before me, William B. Harter, a notary public in and for said county, Mary O. Stone and Thomas Carten, with whom I am personally acquainted, and whom I know to be the petitioners, and who made oath in due form of law that the facts stated in the foregoing petition as of petitioners' own knowledge are true, and that those stated to be on information and belief they believe to be true.

(S'g'd) MARY O. STONE,
THOS. CARTEN.

Subscribed and sworn to before me this 18th day of September, A. D. 1888.

[SEAL.] WM. B. HARTER.

EXHIBIT B.

Interstate Commerce Commission.

IN THE MATTER OF THE APPLICATION OF MARY O. Stone and Thomas Carten, copartners, etc.,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

To the Honorable the Interstate Commerce Commission:

The Detroit, Grand Haven & Milwaukee Railway Company, respondent in the above-entitled cause, answering the petition, says:

First. It admits that the petitioners are engaged in the retail sale of goods, as in paragraph numbered first of said petition stated, and that goods are purchased by them in Philadelphia, New York, and other points east of Detroit.

Second. It admits that respondent is a corporation existing under and pursuant to the laws of the State of Michigan and is a common
8 carrier of passengers and property for hire between said city of Detroit and the city of Grand Haven, both of said places and its entire line of railroad being in the State of Michigan. It denies that it is a common carrier or engaged in the transportation of passengers or property between said city of Detroit and the city of Milwaukee, in the State of Wisconsin, or that it owns or control/s a line of steamboats operating across Lake Michigan between said two last-named cities. But there is a line of steamboats engaged in transportation of persons and property across Lake Michigan between said cities of Grand Haven and Milwaukee, from which respondent receives traffic consig'ed over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee. All of said boats are owned, operated, and controlled by an independent corporation, organized under the laws of the State of Michigan, by the name of the Grand Haven & Milwaukee Transportation Company, although the management of its business is under the control of the same officers as the said road and business of this respondent. In no other way or sense are said water transportation and respondent's road under one management or control.

Third. Respondent admits the averments of said petition contained in paragraph thereof numbered three.

Fourth. It further admits the shipments of freight from Philadelphia, New York, and points east of Detroit, which are delivered to respondent's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia before reaching the city of Grand Rapids, and that the former place is nearer the city of Detroit than the latter over respondent's railroad.

Fifth. Further answering, respondent admits that it provides at its own expense carts or trucks at the city of Grand Rapids for the service of transporting merchandise and freight generally between its station and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without any additional charge to the owner or shipper of the property on account thereof, and that this service is not afforded to petitioners or other merchants at said city of Ionia. This service at Grand Rapids, however, is not secretly rendered, but openly and notoriously rendered by respondent, and, as respondent is informed and believes, has been for a long period of time past, to wit, for twenty-five years and upwards. In justification of this, respondent says that its station at said city of Grand Rapids is, on the average, one and a quarter miles from the business sections of said city, where the traffic of the place tributary to respondent's road originates or terminates, while respondent's station for receiving and discharg-
9 ing freight and property at said city of Ionia is not to exceed one-eighth of a mile distant from the business center of said city. At said city of Grand Rapids there are two other railroads, namely, the Michigan Central Railroad and the Detroit, Lansing & Northern, both of which are immediately and directly competitive with respondent's road for the business of said place, and the stations of these two roads for receiving and discharging freight and property at that place are in the business center of said city, requiring only a short haul to and from their stations of distance not to exceed, on the average, more than one-quarter of a mile. Respondent did its carting of freight to and from its station at said city of Grand Rapids substantially in the same manner as at present long prior to the time when either said Michigan Central or Detroit, Lansing & Northern Railroad was constructed at that place. Respondent, further answering, says, upon information and belief, that said Michigan Central Railroad Company and said Detroit, Lansing, & Northern Railroad Company both, notwithstanding the more favorable situation of their stations for securing traffic at said city of Grand Rapids, either haul free of charge to the owner or shipper all freight and property to and from their stations, or make to such owner or shipper a pecuniary allowance or deduction from the rate of freight charged equivalent to the cost of such service, while neither of said companies extends the same advantages to the shippers at other points on the lines of their respective roads between said city of Grand Rapids and the city of Detroit, with perhaps the single exception of the city of Jackson, a station on the line of said Michigan Central Railroad between said city of Grand Rapids and said city of Detroit.

Respondent is informed and believes, and so states the fact to be, that owing to the short distance between the station and the several places in

said city of Ionia to and from which traffic has to be hauled the actual cost of hauling is trivial and constitutes an insignificant pecuniary expenditure of the petitioners or any other shipper or person interested in shipments of goods or property over respondent's railroad in said city. No complaint has ever been made to respondent of the exceptional service performed by it at Grand Rapids in carting to and from its station there, either by petitioners or any other shipper, merchant, trader, or other person of said city of Ionia. And respondent further states, on information and belief, that neither the petitioners nor any other person, firm, or corporation at said city of Ionia, interested in shipping over respondent's road encounters competition in business to any appreciable degree with business at said city of Grand Rapids. Respondent therefore sub-
10 mits, the facts being made to appear, that said petition should be dismissed, and that the relief therein prayed for should not be granted.

(Signed) THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.
By W. J. SPICER, *Gen'l Manager.*
E. W. MEDDAUGH,
Sol'r for Resp't.

STATE OF MICHIGAN, *County of Wayne, ss:*

W. J. Spicer, being duly sworn, deposes and says: That he is general manager of the Detroit, Grand Haven & Milwaukee Railway Company, the respondent named in the foregoing answer, and executes the same in its behalf; that he knows the contents of said answer and *and* that the same is true of his own knowledge, except as to matters therein stated to be on information and belief, and as to those matters he believes it to be true.

(S'g'd) W. J. SPICER.

Subscribed and sworn to before me this 5th day of October, A. D. 1888.
FRANCIS E. RANKIN,
Notary Public, Wayne County, Michigan.

EXHIBIT C.

Before the Interstate Commerce Commission.

MARY O. STONE AND THOMAS CARTEN
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

Complaint filed September 24, 1888. Answer filed October 8, 1888. Heard January 29, 1889. Brief for complainants filed January 24, 1889. Briefs for defendant and cartage companies filed January 29, 1889. Decided April 26, 1890.

Where a common carrier, subject to the act to regulate commerce, has established and published its schedule of rates and charges for a station on its line, free cartage furnished by the carrier for the collection and

delivery of freight carried on its road to or from such station, operates as a reduction or rebate from the schedule charge and is unlawful. If free cartage at a station has the effect to reduce a rate below the charge
11 at another station nearer the point of shipment it is unlawful as a less charge for a longer distance over the same line and in the same direction, the less being included within the greater.

It is not material to the question of the lawfulness of free cartage furnished at one town and not at another that the business was done in that way for many years before the act to regulate commerce was enacted. If what was done and is now done works unjust discrimination, or is in any particular obnoxious to the law, it is an abuse, and one that it must be assumed was intended to be corrected by the act.

The respondent company had a tariff schedule in effect grouping the rates from eastern points at Ionia and Grand Rapids in Michigan, Ionia being the shorter distance, and furnished free cartage at Grand Rapids and not at Ionia.

Upon complaint by a firm of dealers at Ionia, held that the free cartage at Grand Rapids was in effect a rebate and unlawful.

THOMAS F. MCGARRY & ASHLEY POND, *For Complainant's.*
E. W. MEDDAUGH, *For Defendant.*
OTTO KIRCHNER, *For Cartage Companies.*

REPORT AND OPINION OF THE COMMISSION.

COOLEY, Chairman:

The complaint in this proceeding sets forth that complainants are merchants doing business in the city of Ionia, in the State of Michigan, and that they purchase their goods at Philadelphia, New York, and other points east of Detroit; that respondent is a carrier of passengers and property partly by railroad and partly by water from the city of Detroit through and across the State of Michigan to the city of Grand Haven, and thence across Lake Michigan to Milwaukee, in the State of Wisconsin, passing through said city of Ionia, and also through the city of Grand Rapids in the State of Michigan; that for its services as such common carrier in carrying merchandise it has established and published a tariff of charges by which it makes on all freights from Philadelphia, New York, and all other points east of Detroit the same rates for petitioners and others at Ionia that are charged for the same class of freights to the merchants at Grand Rapids; that all shipments of freights from Philadelphia, New York, and other points east of Detroit pass through Ionia before reaching Grand Rapids, and over the same line and in
12 the same direction, the shorter being included in the longer distance; that respondent, while openly charging petitioners no more for the transportation of freights from Philadelphia, New York, and points east of Detroit than is charged for similar freights so consigned to the merchants of Grand Rapids, nevertheless discriminates in favor of the merchants of Grand Rapids and against petitioners by delivering all such freights at the warehouse in Ionia and at the doors of consignees at Grand Rapids, thus charging petitioners and the merchants of Ionia more on freights consigned from Philadelphia, New York, and other points

east of Detroit delivered at their doors than it charges on similar shipments delivered to merchants doing business at Grand Rapids; that respondent, as a means of transportation of such freight, employs under contract a system of drays which take the freight at the warehouse in Grand Rapids and deliver the same to the merchants of the city free of charge, while the same service costs petitioners and the merchants of Ionia from ten to thirty-three per cent of the freight charges in addition thereto, so that petitioners and the merchants of Ionia are compelled to pay for the transportation from Philadelphia, New York, and points east of Detroit from ten to thirty three per cent more than is charged for the transportation by the respondent railway company for similar shipments to the merchants of Grand Rapids; that by this discrimination respondent violates sections 2, 3, and 4 of the act to regulate commerce.

First. In charging, collecting, and receiving from petitioners and the merchants of Ionia a greater compensation for service rendered in the transportation of property from Philadelphia, New York, and points east of Detroit than respondent charges, demands, or receives from the merchants of Grand Rapids for the like service under substantially similar circumstances.

Second. In giving an undue and an unreasonable preference and advantage to the merchants of Grand Rapids, subjecting petitioners and the merchants of Ionia to undue and unreasonable prejudice and disadvantage.

Third. In charging more for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.

Petitioners pray an investigation and that respondent may be ordered to discontinue the further draying of freights for the merchants of Grand Rapids of merchandise consigned from Philadelphia, New York, and points east of Detroit, or to render the like service to petitioners and the merchants of Ionia, and for other and further relief.

The respondent answered the complaint paragraph by paragraph, but in view of the stipulation of facts it is not deemed necessary to
13 recite the answer here. The free cartage at Grand Rapids is admitted and it is openly and notoriously done and has been for a long period of time, to wit, for twenty-five years and upwards. In justification of this respondent says that its station at Grand Rapids is on an average one and one-quarter miles from the business sections of the city where the traffic of the places tributary to respondent's road reaches or terminates, while its station for receiving and discharging freight and property at Ionia is not to exceed one-eighth of a mile from the business centre of the city. At Grand Rapids there are two other railroads—the Michigan Central and the Detroit, Lansing & Northern—both of which are immediately and directly competitive with respondent's road for the business of the place, and their stations for the receiving and discharging of freight and property at that place are in the business centre of the city, requiring only a short haul to and from their stations of a distance not to exceed on the average one-quarter of a mile. Respondent did the carting of freight to and from its station at Grand Rapids substantially the same as at present before the other roads were constructed to that place. Respondent denies that petitioners or any other person, firm, or

corporation at Ionia, interested in transportation over its road, encounters competition in business to any appreciable extent with business at Grand Rapids.

The case being thus at issue, the parties entered into a written stipulation of facts which constituted the sole evidence on which the case was submitted for decision. Upon that evidence we find the facts to be as follows:

1. The complainants are copartners, doing business under the firm name of Stone & Carten, and are engaged in the sale at retail of goods, wares, and merchandise in the city of Ionia, county of Ionia and State of Michigan, purchasing said goods, wares, and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Michigan.

2. That the respondent railway company is a corporation existing under and pursuant to the laws of the State of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railroad being in the State of Michigan, but it does not own and control a line of steamboats plying across Lake Michigan between Grand Haven and Milwaukee, Wisconsin, but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan between Grand Haven and Milwaukee, from which the respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee; that all of said boats are under
14 the control and direction of an independent corporation, organized under the laws of the State of Michigan, by the name of the Grand Haven & Milwaukee Transportation Company; that the management of the business of the last named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

3. The respondent, for its services as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights which makes on all freights, from Philadelphia, New York, and Boston, and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which is made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids, a copy of which schedule or tariff is hereto annexed and made and deemed a part of this stipulation.

4. The shipments of freight from Philadelphia, New York, Boston, and points east of Detroit, which are delivered to the respondent's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.

5. That the respondent provides, at its own expense, drays, carts, and trucks, at the city of Grand Rapids, for the service of transporting merchandise and freight generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston, and points east of

Detroit between its station at Grand Rapids and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders, and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to-wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is on an average one and a quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business center of said city; that at the city of Grand Rapids there are two other railroads, the Michigan Central Railroad and the Grand Rapids, Lansing & Detroit Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short haul to and from their stations, on an average about one-quarter of a mile; that respondent did the carting of freight to and from its station at Grand Rapids substantially in the same manner as at present long prior to the time when either said Michigan Central or Grand Rapids, Lansing & Detroit railroads constructed to that place.

6. That the actual cost of carting or draying freight from respondent's warehouse in the said city of Ionia to the several places in said city of Ionia to and from which traffic has to be hauled is two cents per hundredweight; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders, and other patrons of its road at Grand Rapids is two cents per hundredweight.

7. That there is but slight competition encountered by the complainants and other persons, firms and corporations engaged in business at the city of Ionia interested in shipping over respondent's road, with similar business at the city of Grand Rapids.

9. That complainants have not brought any suit for the recovery of money or damage for which the respondent is alleged to be liable under the provisions of the act to regulate commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

10. The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6,000. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 985,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.

11. Cartage by railway companies in a similar manner to that at Grand Rapids is conducted by other railway companies at exceptional stations in the State of Michigan, and more or less extensively practiced by companies in other States at exceptional stations.

In disposing of this case it is proper to say at the outset that the complaint made of the respondent is not that it gives free cartage between its

warehouse and the places of business of the patrons of its road at Grand Rapids, for it is not pretended that this of itself would be illegal. The complaint is that the free cartage is given to the patrons of the road at Grand Rapids, and a like service is not rendered on similar consign-
16 ments to the patrons of the road at Ionia, though the latter are charged the same rates on the traffic. This, it is claimed, is unlawful:

First. Because to render such service at Grand Rapids is equivalent in law to granting to its dealers a special rate or rebate equal to the cost of cartage.

Second. Because the performance of this service gives to the Grand Rapids dealers an undue and unreasonable preference and advantage.

Third. Because the respondent exacts a greater compensation for the transportation of a like kind of property from eastern cities to Ionia, a shorter distance, than from the same cities to Grand Rapids, a longer distance over the same line and in the same direction, the shorter being included in the longer distance and the circumstances of carriage being substantially similar.

This is the complaint; and as thus summarized it presents allegations of three distinct violations of law, all shown by the same state of facts. If either one of them is well founded the complaint must be sustained.

It may be further stated at the outset that it is wholly immaterial to the legal questions now raised that the business at the two towns is now done just as it was done for many years before the act to regulate commerce was enacted. If what has been and is now done works an unjust discrimination, or is in any particular obnoxious to the general spirit and intent of the act, it is an abuse, and we may assume that it was one of the very abuses which were in the contemplation of Congress when the act was passed and which were meant to be corrected. But whether specially in contemplation or not, if it would be illegal as a new practice it is equally so as an old practice; time might habituate the people to it and induce acquiescence, but could never, as against the express provisions of the statute, compel submission.

It is still further to be said that the fact that Ionia is a small town and its dealers scarcely come at all into competition with the dealers of Grand Rapids is no answer to the complaint made. On a question of unjust discrimination the fact of competition may be properly considered, for all the circumstances of situation ought to be known to enable the proper judgment to be formed; but it may happen that as between a large town and a small the reason why there is no competition is because the more favorable rates to the former have built it up and kept the latter in a condition of subordination and dependence. It would be difficult to conceive of discrimination more unjust than that which has such a blighting effect; and the wrong would be emphasized and aggregated if the very helpless-
ness which the injustice has begotten could in law be an answer to
17 any complaint for redress. What was said by the Commission in Martin v. Chicago, B. & Q. R. Co., 2 I. C. C. Rep., 25, is applicable here, and we see no occasion to depart from the views there expressed. If the interest of the two towns were entirely distinct and noncompetitive, there might still be unjust discrimination in giving to the one more favorable rates than to the other, and if the complaint in that par-

ticular were not sustained, the question of violation of the long and short haul clause of the act would remain. Upon that question the fact of competition would have at the best very remote if any influence.

Coming, then, directly to the principal questions raised, we may first inquire whether what is done by the respondent at Grand Rapids is equivalent to the payment of a rebate to shippers.

It is contended by the defense that the cartage is merely a terminal expense—an expense imposed upon the respondent because the situation of its warehouse is so remote from the business part of Grand Rapids that it would otherwise be excluded from the business by its competitors.

It must be conceded, however, that cartage is not in general a terminal expense, and is not in general assumed by the carrier. The transportation as between the carrier and its patrons ends when the freights are received at the warehouse, and the charge is made for a service which ends there. This is the rule; and if the distance of the warehouse from the center of business of a city creates an exception in any case, so as to make the consignee's place of business the end of transportation, no one has undertaken to indicate to us the distance upon which the exception would depend. The distance in this case is a mile and a half; but if it were but half that distance, it would still be open to the carrier to say that the case was exceptional, and upon that ground to assume the payment for cartage if its interest would apparently be subserved thereby. Of course the cost is made a terminal expense by the mere fact of assumption, but it does not follow that as between the carrier and its patrons at another point it is properly such.

The effect of the respondent doing the cartage at its own cost of two cents per hundred pounds is precisely the same that it would be if all its rates to Grand Rapids were made two cents a hundred pounds less and the consignees were left to pay the cost of cartage. But if that were done the Ionia rates would clearly be illegal, because they would be two cents a hundred pounds more than the Grand Rapids rates. If, then, the argument for the respondent is sound, the same thing in substance and effect may be legal to be done one way and illegal when done in another; the form will determine its lawfulness and not its substance. So if
18 the rates to the two towns were made the same, but the Grand Rapids consignees were allowed a rebate of two cents a hundred because of their greater distance from the railroad warehouse, the illegality would seem to be equally obvious. But this would differ from the present arrangement in form only, not at all in substance.

The difficulty with respondent's position springs from the fact that Ionia and Grand Rapids are grouped, and the same rates nominally given to both.* It is not competent to give to Grand Rapids the lesser rates on consignments from eastern points, for it is not claimed that the transportation to the one town is made under circumstances and conditions substantially different from those under which it is made to the other. The only difference apparent is in this very matter of cartage, and that is a matter not ordinarily included in the transportation at all, and, if included, it appears by the agreed facts to be no more expense at the one town than at the other. When, therefore, the respondent is itself at the cost of the cartage at Grand Rapids and not at Ionia, it does in effect make to consignees at Ionia a charge which is greater upon the shorter haul than is

made to those at Grand Rapids upon the longer haul, and no attempt is made to justify it under the law by making proof of dissimilar circumstances and conditions. The respondent, for the charge it makes to consignees at Grand Rapids, performs a service additional to that which is performed to consignees at Ionia—a service the value and cost of which is two cents a hundred pounds—and reduces the charge made at Grand Rapids for the service performed for consignees at Ionia by that much.

It follows that the long and short haul clause of the fourth section of the act to regulate commerce is violated, and consignees at Ionia are overcharged to the extent indicated. The complaint will be sustained on that ground, and order will be entered accordingly, without expressly passing upon other points raised.

Commissioners Morrison and Schoonmaker concur in the foregoing report and opinion, with the addition thereto that the free-cartage service rendered by the respondent at Grand Rapids is unlawful on the further ground that it is in effect a device for receiving less than the established tariff rate to and from that point. Conceding that it works no discrimination between shippers and consignees at Grand Rapids who are patrons of the respondent, it nevertheless serves as a rebate or it can have no value at all. It compels competing carriers to meet it by a reduction of rate or to perform a like service.

The purpose of the act is to be gathered from all its provisions.
19 It is provided in the sixth section that when a common carrier shall have established and published its rates, fares, and charges it shall be unlawful for it to charge or receive a greater or less compensation for the transportation of persons or property, or for any service in connection therewith, than is specified in such published schedule. Nominally receiving a full rate with one hand and paying part of it back with the other, either in money or its equivalent in service, is plainly, whether so intended or not, a device that works an evasion of the law and continues a practice that is now unlawful. The fact that the practice existed prior to the law, and was in use to some extent by other carriers, does not aid its lawfulness. It never was general, but at most only an exceptional practice, and its lawfulness is to be determined not by former or even present use, but by the provisions of the act. The nature of the device is tested by its practical results upon competitors above stated. The cartage service is a service in connection with the transportation, and is in effect an indirect rebate from the rate to the extent of the value of the cartage. It results in the carrier getting less than its tariff rate for its service, and is therefore unlawful.

The order of the Commission is that the respondent within thirty days from the service of a copy of this report and opinion cease and desist from the violation of law found in the report and consisting in furnishing free cartage to and from its station at Grand Rapids, Michigan, for freight carried on its road.

Exhibit D.

At a general session of the Interstate Commerce Commission, held at its office in Washington, on the twelfth day of May, A. D. 1890.

Present: Hon. Thomas M. Cooley, chairman; Hon. William R. Morrison, Hon. Augustus Schoonmaker, Hon. Walter L. Bragg, Hon. Wheelock G. Veazey, Commissioners.

MARY O. STONE AND THOMAS CARTEN
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

This case being at issue upon complaint and answer on file, and having been duly assigned for hearing on the 29th day of January, 1889, and a hearing having been had upon the pleadings, proofs, and arguments of counsel, and the report and opinion of the Commission having been made and filed, whereby, among other things, it is found
20 and decided that the defendant has put into effect a tariff schedule by which rates and charges for transportation of freights from eastern points to Ionia and Grand Rapids, points on its line in the State of Michigan, are made the same, Ionia being a shorter distance from said eastern points than Grand Rapids, and that the defendant, in connection with its transportation service, furnishes free cartage of freights at Grand Rapids to and from its station and its patrons' places of business, and does not furnish such free cartage at Ionia, and that by reason thereof said defendant does unlawfully give rebates from its published tariff or schedule of rates, fares, and charges at Grand Rapids to shippers and consignees at that point, and does by the same means unlawfully charge and receive a greater compensation in the aggregate for the transportation of like kinds of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, in violation of the provisions of the act to regulate commerce.

It is ordered and adjudged that the defendant, the Detroit, Grand Haven & Milwaukee Railway Company, be and it is hereby required, within thirty days from and after the service of a copy of the report and opinion in this proceeding and of this order, to wholly cease and desist from furnishing free cartage of freights at Grand Rapids, in the State of Michigan, whereby rebates from its lawfully published schedule of rates, fares, and charges at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from eastern points to Grand Rapids aforesaid are made less than charges for the transportation over its line of like kinds of property shipped from the same eastern points to Ionia, in the State of Michigan.

And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the Commission herein in conformity with the provisions of the fifteenth section of the act to regulate commerce.

EXHIBIT E.

DETROIT, MICH., *June 9, 1890.*

STONE ET AL.
vs.
D., G. H. & M. RY. CO.

Cartage by railway companies.

The Hon. Interstate Commerce Commission:

21 Your ruling on the question of law involved in the case of Stone et al. vs. The Detroit, Grand Haven & Milwaukee Railway Company was both a surprise and disappointment to the officers of the railway company. The opinion of your learned chairman has failed to convince us that our contention as to the law is erroneous. A large number of other railway companies in the United States that cart goods under circumstances more or less similar to those of the respondent company have appealed to us to procure a judicial determination of the question. These appeals, together with the serious consequences to the respondent's business of a compliance with your order, have finally, after mature consideration, induced the company to decline to comply with the order. This position is taken not with any disposition on the part of the management to indulge in factious opposition and much less to embarrass the Commission, but with the simple purpose of having such proceedings instituted in court as will result in a judicial settlement of the legal question involved.

Unfortunately, under the interstate-commerce act there is no other way open to us for securing the interpretation of the act by the court.

If you shall consider it advisable to have suit instituted, as contemplated by the act in the circumstances of this case, I will not only throw no obstacle in the way of a prompt hearing and decision of the matter, but will cooperate to this end.

Very respectfully, yours, etc.,

E. W. MEDDAUGH,
Att'y for D., G. H. & M. R'y Co.

OFFICE OF THE INTERSTATE COMMERCE COMMISSION,
WASHINGTON, D. C.

I, Edward A. Moseley, secretary of the Interstate Commerce Commission, hereby certify that the foregoing exhibits, five in number, and marked A to E, both inclusive, are correct copies of the originals thereof on file among the records of the Interstate Commerce Commission.

In testimony whereof I hereunto set my hand and affix the seal of the said Interstate Commerce Commission, at the city of Washington, in the District of Columbia, this twenty-fourth day of October, 1891.

[L. S.]

EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

A true copy of the petition and exhibits.

[Seal of the Interstate Commerce Commission.]

EDW. A. MOSELEY,
Secretary of the Interstate Commerce Commission.

22 The circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Co.

It is hereby stipulated that the attached copy of petition may be substituted and filed with the same force and effect as the original, which has been mislaid or lost from the files.

JOHN POWER,
U. S. Attorney.
By RICHARD L. NEWNHAM,
Ass't U. S. Attorney, Solicitor for Complainant.
E. W. MEDDAUGH.
Per STANLEY,
Solicitor for Defendant.

(Endorsed:) No. 1059. The circuit court of the United States for the western district of Michigan, southern division. In equity. Interstate Commerce Commission vs. Detroit, Grand Haven & Milwaukee R'y Co. Copy of petition and stipulation. Filed Aug. 21, 1894. Chas. L. Fitch, clerk.

Answer.

In the circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

The answer of the Detroit, Grand Haven & Milwaukee Railway Company to the petition of the Interstate Commerce Commission, filed against it in the above-entitled cause.

First. Respondent admits all of the averments of fact contained in said petition, and it also admits the finding of facts embodied in the opinion of the Interstate Commerce Commission attached to and made a part of said petition as Exhibit C, to wit, the findings numbered respectively 1, 2, 3, 4, 5, 6, 7, 9, 10, and 11.

Second. In further answer to said petition respondent says that it has been the practice of railway companies engaged in interstate commerce, not only in the State of Michigan but throughout the United States, to do free carting as a means of securing traffic at numerous stations on their respective lines of railway for many years past and long
23 before the passage of the interstate-commerce act, and that this practice still continues. It has been and is deemed by respondent and the other railway companies referred to as legitimate as the expense of maintaining commercial agents at exceptional stations to solicit freight

and other business for the road. It has also been the practice, which still continues, at exceptional stations on the lines of many railroads engaged in interstate-commerce business to build at large expense systems of belt railroad, so called, for the purpose of securing business for the main line of railway, and over such belt roads cars in connection with interstate traffic are hauled between the main line of road of the company operating it and the places of business adjacent to and near the track of such belt system free of charge to the shipper. Respondent states, on information and belief, that such belt systems exist and are operated as aforesaid by the Michigan Central Railroad Company in the State of Michigan at the following-named places, to wit: At the city of Detroit, the city of Jackson, the city of Lansing, the city of Battle Creek.

Systems of free carting are also carried on extensively by railroad companies in connection with interstate-commerce traffic, in the following-named cities: The city of Detroit, the city of Chicago in the State of Illinois, the cities of Toledo and Cleveland in the State of Ohio, and the city of New York, and respondent is informed and believes, and so states the facts to be, that the practice prevails in numerous other cities in the United States, and by many different railway companies engaged in carrying interstate traffic. In all of these instances, in respect of free cartage as in respect of the belt systems of railway and free transportation thereon, the practice prevails only at exceptional stations, where the business is of sufficient magnitude to warrant the carrier in incurring the expense, and such expense is deemed to be, in these instances, legitimate as a means of securing traffic for the railroad, and of affording increased facilities and dispatch in doing its business.

Third. Respondent further states that on every railroad in the State of Michigan—and is informed and believes that the same is true on every railroad in the United States—there are tracks constructed by the railway company, at its own expense, at exceptional stations on the line of road, leading from the main track of the road to private business establishments, which are used solely for delivering and receiving freight in the business between such private business establishments and the railway, much of which is interstate traffic, and without any charge being made by the railway company therefor; while other private business establishments at the same station of the railroad, and at other stations on the same railroad, are not afforded these advantages in connection with such traffic, but are compelled to incur the expense of carting to and from stations.

24

The practice of the railway companies of the country in this regard has existed almost if not quite from the beginning of railroads in this country, and is believed to be fully justified by considerations of business economy and that it does not infringe any provision of the interstate-commerce law. And yet the respondent claims and submits that the practice involves more of the elements of discrimination than does the cartage system at Grand Rapids, here complained of.

Fourth. Respondent's practice of free carting at said city of Grand Rapids was originally adopted and is still continued because it is less expensive to it than would be a change of its line of railroad so as to bring it into closer proximity to the business center of said city or the construction and operation of spur tracks from its main line of road into

said business center, where the main-line tracks of its competitors, the Michigan Central and the Detroit, Lansing & Northern Railroad Companies, are laid in said city.

Such free cartage has the additional advantage, wherever it exists, of enabling the carrier to promptly clear the freight buildings of traffic and prevent its burdensome and expensive accumulation, and it secures a method of order in delivering traffic from its buildings. Where the acceptance and removal of freight is left to consignees, the tendency of all stations where the traffic is great is for consignees to make a convenience for themselves of the freight buildings of the railway company for storage of their freight, which leads to great embarrassment and expense to the company. And if consignees are left to receive their freight at the station there is no order observed, and in the nature of the business can not be, in their calls for freight. The freight can not be delivered in the order of its reception at the station, and the freight last received into the station is often first called for. To so make delivery always involves a considerable increase of expense to the company.

The practice of delivering to the consignee also saves the expense of sending out to the consignees advice notes of the arrival of freight.

Fifth. Respondent states that the free cartage at said city of Grand Rapids or the extension of its railroad tracks into the business center of said city is an absolute condition of respondent's procuring for its road a due and proper or any considerable part of the freight traffic of said city, and it avers that the matter in dispute involved in this cause exceeds the sum or value of five thousand dollars, exclusive of costs.

25 Sixth. The two cents a hundred pounds paid for cartage at said city of Grand Rapids by respondent is not paid alone for the cartage, but includes the services of the cartage agents, acting in behalf of respondent, in soliciting freight traffic for its road and collecting from consignees and consignors all bills for the freight charges of respondent on the traffic carried. The value of these services to the respondent, aside from the mere matter of carting the freight, is not less than one-third of the sum which respondent pays.

Seventh. Respondent therefore claims and submits that, in view of its own interest and the interest of the people of said city of Grand Rapids, and in view of the business relations between said city and the city of Ionia, the free cartage complained of is not an undue or unreasonable preference or advantage to said city of Grand Rapids, or to its merchants or shippers, as against said city of Ionia, or its merchants or shippers, and particularly as against said Mary O. Stone and Thomas Carten; and that it *it* does not subject said city of Ionia or its merchants or shippers, and particularly said Mary O. Stone and Thomas Carten, *or* any undue or unreasonable prejudice or disadvantage in any respect whatsoever within the true meaning and intent of the interstate-commerce law, and that it is not in conflict with the long and short haul clause (so called) of said law.

THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.
By W. J. SPICER,
Its General Manager.

E. W. MEDDAUGH,
Solicitor for Respondent.

The circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

It is hereby stipulated that the attached copy of answer may be substituted and filed with the same force and effect as the original, which has been mislaid or lost from the files.

JOHN POWER,
U. S. Attorney.
By RICHARD L. NEWNHAM,
Asst. U. S. Attorney, Solicitor for Complainant.
E. W. MEDDAUGH,
Solicitor for Defendant.
Per STANLEY.

26 (Endorsed:) No. 1059. The circuit court of the United States for the western district of Michigan, southern division. In equity. Interstate Commerce Commission vs. Detroit, Grand Haven & Milwaukee R'y Co. Copy of answer and stipulation. Filed Aug. 21, 1894. Chas. L. Fitch, clerk.

The circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

It is hereby stipulated that the attached transcript of testimony be, and the same is, substituted for the original, and it shall be filed with the same force and effect as the original, which has been mislaid or lost from the files.

Aug. 7, 1894.

JOHN POWER,
U. S. Attorney.
By RICHARD L. NEWNHAM,
Asst. U. S. Attorney, Solicitor for Complainant.
E. W. MEDDAUGH,
Solicitor for Defendant.
Per STANLEY.

GRAND RAPIDS, *July 12, 1894.*

R. L. NEWNHAM,
Asst. U. S. Atty.

SIR: I have examined the certificate of U. S. Commissioner Whitaker, hereto attached, and am satisfied that the copies of testimony to which his certificate is attached is correct, and that the same should stand as the original record.

Resp'y,

L. G. PALMER,
Late U. S. Atty.

The circuit court of the United States for the eastern district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

STATE AND EASTERN DISTRICT OF MICHIGAN,
County of Wayne, ss:

27 Herschel Whitaker, being duly sworn, deposes and says that he is a United States commissioner for the eastern district of Michigan, and as such commissioner he did take, stenographically, the testimony which was taken in the above-entitled cause. That the attached transcript of testimony, consisting of pages 1 to 119, inclusive—there being two pages numbered 97—is a true and correct transcript of said testimony and of the whole thereof. That deponent has carefully compared the said transcript with his original notes and knows the facts above stated to be true.

HERSCHEL WHITAKER.

Subscribed and sworn to before me this 30th day of June, 1894.

CHAS. M. HAMMOND
Notary Public, Wayne County, Michigan.

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28 The circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION, PETITIONER,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILway Company, respondent.

The testimony of various witnesses taken on behalf of the respondent in the above-entitled cause in pursuance of the annexed notices, before Herschel Whitaker, a United States commissioner for the eastern district of Michigan, at his office, No. 77 Moffat Building, in the city of Detroit, on the 15th day of February, 1892, at 10 o'clock in the forenoon of said day.

At the hour for the hearing, on the 15th of February, Mr. Otto Kirchner appeared on behalf of the respondent, there being no appearance for the petitioner, and the hearing was proceeded with as follows:

JAMES HUNTER, a witness produced on behalf of the respondent, being duly sworn to testify to the truth, the whole truth, and nothing but the truth, deposed and said as follows:

Examined by Mr. KIRCHNER:

Q. What is your age and occupation and where do you reside?

A. My age is fifty years, my business is cartage agent in Detroit.

Q. Of what company?

A. For the Shedden Cartage Co.; I reside in Detroit, and for twenty-five years I have been in the same business.

At this point in the proceedings, Mr. Palmer, counsel for the petitioner, not having arrived, the further examination of the witness was held open until 11.15, as he was expected to arrive at that time.

At 11.15 a. m., in pursuance of the adjournment heretofore had, the examination was proceeded with as follows:

Mr. Ashley Pond appearing on behalf of the petitioner and Mr. Otto Kirchner appearing on behalf of the respondent.

GEORGE B. REEVE, a witness produced on behalf of the respondent, being duly sworn, testified as follows:

Mr. KIRCHNER. There was no notice given of the taking of the testimony of this witness.

29 Mr. POND. It does not make the slightest difference. There will be no objection on that account.

Mr. KIRCHNER:

Q. Where do you live?

A. In Chicago.

Q. What is your business?

A. Traffic manager of the Chicago & Grand Trunk Railway.

Q. How long have you been such traffic manager?

A. Ten years.

Q. What was your business before that?

A. District general freight agent of the Grand Trunk Railway Company.

Q. Stationed where?

A. At Montreal and at various other places.

Q. How long were you so occupied?

A. Ten years.

Q. And before that what was your business?

A. I was in the service of the Grand Trunk Railway in various positions.

Q. For how long?

A. Eleven years.

Q. So, altogether you have been engaged in the railroad business over thirty years?

A. I am going on my thirty-second year with the Grand Trunk system.

Q. Are you familiar with the practice of railway companies throughout the United States to do free cartage as the means of securing traffic at their various stations, on their respective lines of railway?

A. Yes, sir.

Q. Do you know what has been the practice in that regard? If so, please state.

A. It has been a practice for railway companies to do cartage generally wherever they thought it was to their advantage to do so, in order to secure traffic.

Q. How long do you know that to have been the practice?

A. For at least fifteen years.

Q. State whether the expense of such cartage has been regarded as a reasonable and legitimate means of procuring business.

(Objected to as leading.)

A. Yes, sir; we have always considered it a legitimate means.

Q. Will you please state what circumstances and conditions determine whether free cartage shall be practiced at any railway station?

30 A. It has generally been adopted by railway companies that have not been in as good a position as other railway companies at certain points.

Q. With respect to what?

A. With respect to their terminal facilities.

Q. I would like to have you go more into detail in your answer and have you state what you mean by terminal facilities.

A. All rates are made equal by all lines by agreement, and in order for a railroad company, situated like the Detroit, Grand Haven & Milwaukee at Grand Rapids, for instance, to get any business at all they would have to do cartage, and by their doing cartage they place themselves at the door of every shipper. In other words, they place the shippers that are not on the line and who are on the sidings of competing roads on an equal footing with other shippers. If they were to cease doing cartage the people of Grand Rapids would virtually lose the services of the Detroit, Grand Haven & Milwaukee Railway.

Q. So that by the free-cartage system all the shippers at a certain point are put on an equal footing?

A. Yes, sir; it does away entirely with discrimination in favor of a favored few who are on the sidings.

Q. Do you know whether it has been the practice of railway companies throughout the United States to run their cars free of charge over sidings or belt lines to the stores or warehouses of shippers or consignees, for the purpose of receiving or delivering freight, free of charge for such services?

A. Yes, sir; that has been the custom all over this country at certain points; not at all points, at certain points.

Q. How long have you known that practice to exist?

A. To my own knowledge it has existed for the last twenty-five years.

Q. State whether cotemporaneously with such a practice it has also been the practice of these identical railways to make a switching charge against competing railway companies, for running their cars on such sidings or belt lines to the stores or warehouses of shippers or consignees for the purpose of shipping or delivering freight.

A. Yes, sir; they make a charge for that.

Q. In what cases do they not make a charge?

A. Only when the freight comes over their own line.

Q. When it is not competing business?

A. When it is not competing business.

Mr. POND. You mean when it is not the business of a competing company?

A. That is what I mean.

31 Mr. KIRCHNER. Are you familiar with the respondent's railroad and station at Grand Rapids?

A. Yes, sir.

Q. What can you say as to the expense of receiving and delivering freight at Grand Rapids under the free-cartage system, as compared with the expense of constructing and maintaining and operating belt lines or sidings to stores or warehouses of consignees or shippers, as the case may be?

A. The situation at the present time is such that it is almost impossible for a railway company to get into that territory; therefore, their present system of cartage is far cheaper and better than any other.

Q. Aside from the expense, what advantage has the free-cartage system over free delivery at sidings or belt lines?

A. By free cartage we are at the door of everybody and there is no possible discrimination. The sidings only get into the warehouses of a favored few, and those get the advantage to the injury of the others.

Q. Do you know whether the two cents per hundred pounds paid for cartage at Grand Rapids includes any other service than the cartage of the goods?

A. It does.

Q. Please state what.

A. It was distinctly understood when the contract was made that it would cover the services of soliciting and also for the collection of freight charges, and in fact all duties in connection with the regular agents of the company.

Q. Would it be possible for the respondent to obtain for its railway at Grand Rapids a just and proper or any considerable part of the traffic without either continuing the practice of free cartage or extending its track into the center of the city?

A. No, sir; they would simply get no business at all.

Q. If you know of any other fact to the benefit or advantage of either party, just state it.

A. I don't know anything further, I think.

Cross-examination. Examined by Mr. POND:

Q. Is the Detroit, Grand Haven & Milwaukee Railway controlled by the Grand Trunk, that you represent?

A. I do not represent the Grand Trunk of Canada; I represent the Chicago & Grand Trunk.

Q. What connection have you with the Detroit, Grand Haven & Milwaukee Railway Co.?

A. None whatever, further than a friendly interchange of traffic, the same as we have with any other line.

32 Q. Does the Chicago & Grand Trunk Railway exchange business with the Detroit, Grand Haven & Milwaukee Railway?

A. The same as with any other.

Q. Where do you exchange freight with them?

A. At Durand.

Q. In what direction?

A. In all directions.

Q. What kind of traffic have you coming from the West to exchange with the Detroit, Grand Haven & Milwaukee?

A. I could not tell you the volume, but quite a large amount.

Q. It is a fact, is it not, that the Chicago & Grand Trunk and the Detroit, Grand Haven & Milwaukee are operated and controlled by the Grand Trunk of Canada?

A. Yes, sir.

Q. To what class of freight does this system of delivery or free cartage apply?

A. To all classes excepting the sixth class.

Q. You scarcely understand me. Does it apply to traffic in carload lots where the consignor has to load and the consignee has to unload?

A. I can't answer that question, sir.

Q. You have stated that you know of the practice at Grand Rapids; will you state whether, as a matter of fact, the Detroit, Grand Haven & Milwaukee Railway delivers free traffic that is transported in carload lots under the carload tariff?

A. I would rather not answer that question for the simple reason that I am not an officer at the present time of the Detroit, Grand Haven & Milwaukee Railway Co., and I don't know what change they have made since I left.

Q. What was the practice in that regard before you left?

A. We used to deliver everything except sixth-class freight, and in that class we used to make special exceptions from time to time.

Q. How long ago did you sever your connection with the Detroit, Grand Haven & Milwaukee Railway?

A. It is only a little over two years.

Q. And you say up to that time the Detroit, Grand Haven & Milwaukee Railway made no difference between traffic which was shipped in carload lots and traffic in less than carload lots?

A. None whatever in the classes I have mentioned.

Q. The official tariffs make a distinction between carload lots and less than carload lots, do they not?

A. Yes, sir.

33 Q. And the official tariffs make a distinction between traffic that is loaded by the consignor and unloaded by the consignee, and traffic not thus so loaded and unloaded, do they not?

A. Yes, sir.

Q. Why is it that the tariffs make a distinction between the classes I have named and the classes named in the last question?

A. There are several reasons for it. We can afford to make a less rate on a full carload of a certain article than on a part of a carload of a certain article.

Q. You can afford to make a less rate, can you not, when the traffic is to be loaded by the consignor and unloaded by the consignee than where it is not to be so loaded and unloaded?

A. That is a question of great doubt whether we can or not.

Q. You do do it, don't you?

A. We do do it in some instances, and I would also say that there are exceptions that I ought to have mentioned in my previous answer. There are some exceptions for some classes of freight that applies to carloads as well as to less than carload lots.

Q. The tariffs are based upon the fact that certain kinds of traffic are to be carried in carload lots and are to be loaded by the consignor and unloaded by the consignee, are they not?

A. Yes, sir; the tariffs say so, but it is not carried out.

Q. Notwithstanding the tariffs, then, the Detroit, Grand Haven & Milwaukee, assuming that a certain kind of traffic is to be loaded by the consignor and unloaded by the consignee, nevertheless delivers that traffic by cartage free, does it not?

(Objected to as immaterial.)

A. We are forced to do it; yes, sir; we are forced to do it.

Q. By whom are you forced to do it?

A. By roads that have sidings to warehouses and who deliver free to warehouses, although the classification and tariffs say it is to be loaded by the consignor and unloaded by the consignee.

Q. Notwithstanding the tariff so provides, the respondent company at Grand Rapids does collect and deliver free that kind of traffic?

A. They are forced to do so; yes, sir.

Q. If the respondent delivers free at Grand Rapids, competing companies, although their stations are nearer to the business, must also deliver free, must they not?

A. I think they ought to.

Q. To be on an equality with the respondent company, which delivers free, the other companies must deliver free, must they not?

34 A. I think they ought to be compelled to do so.

Q. There would be no objection, then, to the tariff showing that the rate charged is for collection and delivery free, would there?

A. In my opinion, there would be no objection; no, sir.

Q. You say that this practice of delivering and collecting free has prevailed for many years throughout the United States. Will you state at what places in the United States, of your own knowledge, you know that practice has prevailed?

A. At Detroit, at Grand Rapids, at Cleveland, Ohio, at Chicago, Illinois, at Peoria, Illinois, at St. Louis, Missouri, at Battle Creek, Michigan, at Milwaukee, Wisconsin, and a good many other places.

Q. Which of these places you have named are reached by roads controlled by the Grand Trunk Railway of Canada?

A. Detroit, Port Huron, and Battle Creek.

Q. And Grand Rapids?

A. And Grand Rapids; but I would like to say in mentioning Grand Rapids that long before the Grand Trunk Railway controlled the Detroit, Grand Haven & Milwaukee Railway this cartage system was instituted. It was so instituted when it was a competitor of the Grand Trunk.

Q. When was it competitive with the Grand Trunk, and between what points?

A. When the Great Western Railway was the closest connection that the Michigan Central had, and the Great Western Railway controlled the Detroit, Grand Haven & Milwaukee, and it was their policy to do that business over the Grand Trunk.

Q. The business of the Detroit, Grand Haven & Milwaukee had no connection with the Michigan Central, had it?

A. Yes, sir.

Q. How?

A. The strongest competing line the Detroit, Grand Haven & Milwaukee Railway has was the Merchant's Dispatch Line, which was entirely controlled by the Michigan Central and the New York Central roads.

Q. Did the Michigan Central get a direct business from the Merchant's Dispatch Line that came over the Detroit, Grand Haven & Milwaukee?

A. Yes, sir.

Q. Where did it receive it?

A. At Detroit.

Q. Receiving it for what point?

A. Freight for Chicago.

35 Q. You think business would come over the Detroit, Grand Haven & Milwaukee to Detroit and thence to Chicago?

A. Yes, sir.

Q. Do you know that a pound of business ever went in that way over that road?

A. Yes, sir.

Q. When?

A. I could not say when, but I could fix it very easily.

Q. The Great Western was a Canadian corporation running between Detroit and Buffalo?

A. Yes, sir.

Q. What railroad companies deliver free at Cleveland?

A. I can not name them.

Q. What do you know about the practice of delivering free at Cleveland?

A. I only know from what the officers of some of the railroad companies have told me.

Q. What railway companies?

A. The New York, Chicago & St. Louis, and the Lake Shore.

Q. What official of the Lake Shore?

A. I have had several discussions with the general freight agent.

Q. Do you understand that the Lake Shore delivers free at Cleveland?

A. I do, sir.

Q. How long has that practice of delivering free at Cleveland prevailed, if you know?

A. I don't know, sir.

Q. How long has it prevailed at Chicago?

A. I could not answer that question.

Q. Has it been begun very recently?

A. No, sir; I went there a little over ten years ago and it was in force then, but privately only.

Q. No, publicly?

A. No, sir.

Q. That is, certain companies delivered free by special agreement with certain customers?

A. Yes, sir; they had made a private agreement with certain customers, and denied it to others.

Q. Before the interstate-commerce act took effect it was a very common practice to pay rebates to certain customers, and not to others, was it not?

A. Yes, sir.

Q. That was considered a legitimate method of getting business, was it not?

A. By some people it was, sir.

Q. By a good many railroad people, was it not?

36 A. I suppose it was. A good many did it, I believe.

Q. Has not the practice of free cartage been exactly equivalent to paying a rebate at the place of collection and delivery?

A. In the way some railroad companies are doing it, I believe it is, but in the way others are doing it, I think not.

Q. Wherein do you make the distinction?

A. A railroad company that comes out and publishes that it will grant free cartage to everybody alike I believe makes no discrimination; but there are a number of railway companies that are only paying it to a few; they are paying it not as cartage, but as a commission.

Q. The tariffs issued by the respondent company do not show that at some places the rate includes free collection and delivery and at others no, do they?

A. Is that in connection with the Detroit, Grand Haven & Milwaukee Railway?

Q. Yes, sir.

A. I can't answer that.

Mr. KIRCHNER. I object because there are no such questions raised by the pleadings.

Q. Is it not a fact that the traffic which is delivered upon switching tracks and along belt lines is traffic in carload lots?

A. No, sir; it is both carload lots and less lots.

Q. Can you give any particular place where the practice of delivering on belt lines or on switching tracks in less than carload lots prevail?

A. I can give you the rule of the company that I represent in regard to that, I think.

Q. Give us the rule of the companies you represent.

A. If we have a carload lot to be delivered to a certain siding or on another company's siding, we will switch the car to them. If, on the other hand, we can do it cheaper by team and team it to that railway company's siding, we will team it. Whichever way is the cheapest we will adopt.

Mr. KIRCHNER. In that case you would pay the switching charge, would you not, if you switched it?

A. Yes, sir.

Mr. POND:

Q. Just name the roads you represent.

A. The Chicago & Grand Trunk, the Michigan Air Line, the Chicago, Detroit & Grand Trunk Junction Railroad Company, the Cincinnati, Saginaw & Mackinaw.

Q. Does the respondent company—that is, the Detroit, Grand Haven & Milwaukee Railway Company—do free cartage elsewhere than at Grand Rapids?

A. I am not aware of it; I don't know whether they do or not.

37 Q. At Grand Rapids I infer there are competing roads; I infer that from what you have stated?

A. Yes, sir.

Q. At what point does the Chicago & Grand Trunk do free cartage?

A. We do it at Battle Creek and Lansing.

Q. Are those competitive points——

A. (Interrupting.) And at Chicago.

Q. Are those competitive points with other roads?

A. Yes, sir.

Q. Switching tracks, so called, leading from main tracks of railroad into business places, are usually constructed partially at the expense of the owners of the business places, are they not?

A. Sometimes they are. I should say perhaps 25 per cent were constructed by the owners of the business places and 75 per cent by the railroad companies.

Q. The owners of business places almost universally furnish the right of way, do they not?

A. The temporary right of way, I believe they do.

Q. Well, the right of way as long as the track remains and is used?

A. I think that is the custom.

Q. And they are constructed for the very purpose of enabling business to be delivered to those business places?

A. Yes, sir.

Q. In carloads; to be received and delivered in carload lots usually?

A. Carload and less lots.

Q. The rule is carload lots, isn't it; and if it is less than carload lots it is exceptional?

A. Carload and less lots? I don't think so. I think if we had a siding into a factory on our road we should deliver all their goods, whether carloads or less lots, right on that siding. I think that is the universal custom.

Q. That is the universal custom of the roads you represent?

A. Yes, sir; and of roads I don't represent. We get our custom from helping other railways.

Q. Well, let's see. A car comes loaded with traffic for half a dozen different shippers or business places, one of whom is reached by a side track or switch track, and the others not; do you mean to say that such a car would be delivered on the side track?

A. Yes, sir; I think so. I think, in other words, on the belt line at Detroit, on the belt line of the Michigan Central Railway, I believe any

goods, whether carloads or less lots, that were brought in here for
38 any factory on their belt line, would be delivered at the regular Detroit rate without switching charge.

Q. Do you mean on the switch track?

A. Yes, sir; at the consignee's place of business. On the other hand, similar goods delivered on Woodward ave., we will say, or Jefferson ave., the consignees would be required to pay the cartage.

Q. You are speaking now not from your own knowledge, but from your assumption of how you think the business is done?

A. No, sir; I speak from knowledge.

Q. Can you give us an instance where it has been done on the Michigan Central Belt Line?

A. I can not give specific instances, but I get my information from parties that I think are entirely reliable.

Q. So what you say upon that subject you say from hearsay and not from what you know yourself about it?

A. Yes, sir.

Q. And are those parties connected with the roads you represent?

A. No, sir; not directly.

Q. I suppose you get it sometimes from shippers or consignees, who tell you that is the fact?

A. Sometimes from the shippers and consignees, sometimes from the officers of other railway companies.

Q. What other railway companies?

A. The traffic manager of the Detroit, Grand Haven & Milwaukee has told me so.

Q. That is one of the Grand Trunk system of roads?

A. I believe so.

Q. You state that it is the practice for a railroad company that has switching tracks to places of business on its line to charge competitive companies for switching cars onto those tracks?

A. Yes, sir.

Q. Isn't it common to charge any other companies, whether competitive or not, for switching onto those tracks?

A. I could not say.

Q. Is it the practice as far as you know of one railroad company to take the cars of another company and switch them without charging?

A. It has been done to my knowledge.

Q. On business in which the company doing the switching has no interest whatever?

A. It has been done to my knowledge.

Q. Where?

A. We have done it ourselves.

39 Q. How long ago did the open practice of doing free cartage at Chicago begin?

A. The open practice began about four months ago.

Q. Up to that time if cartage had been given it was not done openly nor generally, was it?

A. It was pretty general.

Q. By general I mean if a railroad company did do free cartage it did not do it for all its customers?

A. No, sir; not for all its customers.

Q. But for certain of them, as might be agreed?

A. Yes, sir.

Q. Who began this custom of doing cartage only four months ago?

A. The Chicago & Grand Trunk Railway Company.

Q. You say that this free cartage is necessary for a company whose road is not so near to places of business as its competitors, in order to get the business?

A. Yes, sir.

Q. Is that the reason that it is necessary at Battle Creek for the Chicago & Grand Trunk to do free cartage?

A. Yes, sir.

Q. Are not its tracks as near to business as the tracks of other companies reaching Battle Creek?

A. No, sir; in some instances they are, and in others they are not so near.

Q. That is reciprocal, isn't it; that is, in some instances you are nearer to some business than your competitors, and in some instances your competitors are nearer than you are?

A. We are nearer to a very small proportion of the places.

Q. Your company does free cartage at Port Huron?

A. No, sir.

Q. The tariff rate from the East to Port Huron and to Detroit is the same, is it not?

A. I could not say that, sir. On the Chicago & Grand Trunk road we do not issue a tariff from Port Huron to the East.

Q. The tariff from Chicago to Detroit and Port Huron is the same, is it not?

A. In almost everything, yes, sir. There are exceptions.

Q. And the distance is longer from Chicago to Port Huron than from Chicago to Detroit, isn't it?

A. There is very little difference by our lines. The distance is almost the same by our lines.

Q. But by other lines; by the shorter lines?

A. There are no other lines that run from there to Detroit and Port Huron.

Q. But the tariff by your line between Chicago and Detroit is the same as by shorter lines?

A. In some cases only.

Q. What are the exceptions?

A. The shorter lines there now and then make out a special tariff which is lower than we care to touch, and we drop out of it.

Q. Well, the general tariffs?

A. The general tariffs are about the same.

Q. You mean by special tariffs commodity tariffs?

A. Yes, sir.

Q. Let me see if I understand you. Is it a fact that at Grand Rapids the respondent company does free cartage as well for traffic transported in carload lots as for traffic in less than carload lots?

A. I could not answer that. I don't know what they are doing now.

Q. How is it with your company at Detroit?

A. The company with which I am connected is not represented in Detroit at all.

Q. How is it with your company at Battle Creek?

A. We do cartage for carloads and less than carload lots where we do cartage at all.

Q. Your free cartage at Battle Creek is general, isn't it, for all your customers?

A. It is general for all our customers, but we do not cart all classes of freight.

Q. What don't you cart?

A. What is commonly known as "bulk freight;" grain and bricks and that sort of thing.

Q. Those sort of things are loaded by the consignor and unloaded by the consignee, are they not?

A. As a rule they are.

Q. Your tariff is framed on the theory that it will be done, isn't it?

Mr. KIRCHNER. I wish you would make it clear what you mean. Mr. Reeve has no tariff at Grand Rapids.

Mr. POND. I am not talking about Grand Rapids.

Q. I mean the tariff issued by the Chicago & Grand Trunk Railroad or Railway Company, whichever it is.

Mr. KIRCHNER. I direct the witness not to answer the question.

Mr. POND:

Q. What other kind of traffic originates at Battle Creek than those you have named specially, for shipment in carload lots?

A. Almost all classes of manufactured goods. There are a great many factories there.

41 Q. And the shipments in carload lots upon the rates in the tariffs is for carload lots?

A. Yes, sir.

Q. Do I understand that you give free cartage for those manufactured articles that you say are shipped in carload lots at Battle Creek?

A. Some we do and some we do not.

Q. Tell us the some that you do and the some that you do not.

A. When the factory is on a siding we can get into we place the cars on a siding and they load them there. There is no cartage in that instance. At another place where they have no siding we do cartage free.

Q. When you do that you load, don't you?

A. Sometimes we do and sometimes we do not.

Q. Tell us the kind of goods you load and the kind you do not.

A. The kind of goods we object to loading are the kind that require special packing, such as harvesters, stoves, and such things. We prefer to pay the shippers to load them than to load them ourselves.

Q. At Lansing the business is done by your company in the same manner as at Battle Creek, I take it?

A. Yes, sir.

Q. How long has the Chicago & Grand Trunk been doing free cartage at Battle Creek?

A. About eight years.

Q. Do you know whether free cartage was being done there before the Grand Trunk began it?

A. I don't think it was—not openly it was not. There was an allowance being made to parties who owned teams to team to the Michigan Central and not to the Grand Trunk.

Q. How do you know that?

A. We have virtually seen it.

Q. Who has virtually seen it?

A. I have, sir.

Q. At Battle Creek?

A. Yes, sir.

Q. What did you see?

A. I have seen where they have deducted from the expense bill a certain amount.

Q. When was that?

A. I think that was in 1883, just before we made a pool there with the Michigan Central.

Q. The Chicago & Grand Trunk was not doing free cartage at that time?

A. No, sir.

Q. So you speak from hearsay on that subject?

42 A. No, sir; I speak from my side.

Q. You speak from seeing a paper it appeared in?

A. Yes, sir.

Q. In these cases of classes of goods where you prefer, as you said, to allow the shipper something for loading or the consignee something for unloading, it is your practice to make such allowances?

A. No; there is no practice about it.

Q. Are there occasions when you do it?

A. There are occasions.

Q. By special arrangement with the shipper or consignee?

A. Yes, sir.

Q. But it is not general or uniform?

A. It is not uniform; no, sir. A great many shippers volunteer to do it themselves rather than to allow us to do it.

Q. And in those cases you do not pay them anything?

A. No.

Q. In other cases, where they prefer to have you do it, you pay them for doing it?

A. Yes, sir, we do; or, rather, get their men to do it.

Redirect. Mr. KIRCHNER:

Q. In that case these shippers become your own employees for that purpose?

A. Yes, sir.

Q. And you pay them in lieu of your own men?

A. It is all done under special arrangement.

Q. And you pay them instead of your own men?

A. We would if we were asked; if we were not asked we would not pay it.

Q. You spoke of a rebate made by the Michigan Central at Battle Creek, and you say you saw it with your own eyes. Will you please state more definitely where you saw it?

A. I saw it in an office in Battle Creek. I could not say the exact amount now, although I have it recorded in my office at home. It was eight years ago, and it was that proof that determined us——

(Objected to.)

Q. Don't draw your own conclusions. In whose office was it; in the office of the local freight agent there?

A. No, sir; it was in one of the manufacturing establishments of Battle Creek.

Q. You saw the entry made?

A. I saw it on a paper.

Q. Issued by whom?

A. By the Michigan Central Railway.

43 Mr. POND. I supposed you recognized the handwriting?

A. No, sir.

Mr. KIRCHNER:

Q. It purported to come from the Michigan Central?

A. Yes, sir.

Q. Have you any doubt that it did come from the Michigan Central?

(Objected to as incompetent.)

A. No, sir.

Q. You say until four months ago free cartage was not open. Did you wish to limit that answer to any particular place?

A. I understood that the question only applied to Chicago.

Q. Then it was not open elsewhere. You do not wish to qualify your statement in any other respect?

A. It has been open for twenty-five years at other places.

Q. You were asked about the official schedule of freight rates. Do you know or are you familiar with the official schedule of freight rates of the Detroit, Grand Haven & Milwaukee road?

A. No, sir.

Q. Then you don't know whether that schedule now makes a discrimination, or ever has made any discrimination, between freight loaded or unloaded by the shipper or consignee and freight that was loaded or unloaded by the railway?

A. I am not conversant with the rules of the Detroit, Grand Haven & Milwaukee Railway.

Q. You don't know whether any such distinction in the official schedule has ever been made or is now made?

A. I don't know anything about what their system is now.

Q. What do you mean by "bulk goods?"

A. In taking the official classification, I should say 50 per cent of the articles enumerated in that classification are what are called bulk—vegetables of all kinds, grain, flour, brick, pig iron, plaster, and all that sort of thing.

Q. Is that what you understand by sixth class?

A. Yes, sir.

Mr. POND. There are a great many of those goods that are not sixth class, are they not?

A. No, sir; I don't think there are.

Mr. KIRCHNER:

Q. What do you understand by sixth-class freight? What do you wish us to understand?

A. It is the cheapest class of freight. It is the lowest class rate that we make.

Q. Such as what? Can you give us some examples?

44 A. First-class rate is 75 cents and sixth-class rate is 25 cents.

Mr. POND. Explain to Mr. Kirchner that all kinds of property for transportation are divided up into classes.

Mr. KIRCHNER. I am aware of that. I will get at it in my own way.

Q. I want to have some examples of sixth-class freight?

A. Grain, flour, plaster, brick.

Q. When you refer, then, to the cheapest class of freights, you mean the freights upon which the lowest rate of freight is earned?

A. Yes, sir.

Recross. Mr. POND:

Q. Are grain and flour in the same class?

A. Yes, sir.

Q. That has not always been the case, has it?

A. It has been the case except at times when we have had a row amongst the railroad companies.

Q. The rate on flour has been greater than on wheat, and is the same to-day, isn't it?

A. No, sir; it is not the same to-day. In exceptional cases it has been.

ROBERT HENKEL, a witness produced on behalf of the respondent, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. You live in Detroit?

A. Yes, sir.

Q. How long have you lived here?

A. I was born here.

Q. If you will, tell us when that was?

A. For 32 years.

Q. What is your business?

A. I am manager of the Commercial Mills.

Q. How long have you been such manager?

A. For the last three years.

Q. Where in the city of Detroit are the Commercial Mills located?

A. At the corner of Randolph and Woodbridge streets.

Q. How much flour will you manufacture there a year?

A. We manufacture about 150,000 barrels.

Q. How many carloads would that make?

A. They average about 150 barrels to a car.

Q. That would be 1,000 carloads?

45 A. Yes, sir.

Q. Where do you ship your product?

A. To the East.

Q. Have you any switches or sidings from your mills to any railroad?

A. No, sir.

Q. Are you situated on any belt line of railway connecting with any of the railway lines of the city?

A. No, sir.

Q. How is your output taken to the railway stations?

A. It is carted by the railroad.

Q. How much does it cost to cart it? How much do you pay for cartage?

A. I don't pay anything.

Q. Do you have free cartage?

A. Free cartage; yes, sir.

Q. If you had no free cartage what would be the result to your business?

A. We should have to stop the mills. We should have to cut down.

Q. Absolutely?

A. Yes, sir; I think so.

Q. What is it worth to cart a carload of flour?

A. About six dollars.

Q. So that if you were obliged to bear that expense you could not carry on your business, as I understand you to say?

A. No, sir.

Q. Have you any competitors here in Detroit?

A. Yes, sir.

Q. Will you please state who they are?

A. There are quite a number, but there are two that are actual competitors—the Union Mills and David Stott's mill.

Q. How are they situated, with reference to sidings or belt lines?

A. The Union Mills is on the Michigan Central siding, and Mr. Stott's new mills is also on the Michigan Central siding, as I understand.

Q. Do you know whether the Michigan Central runs cars into these sidings from any switch to receive the flour?

A. I think they do; in fact, I know they do. They must have.

Q. Are there any flouring mills that compete with you at Monroe, Rockwood, Toledo, and Port Huron that are situated on sidings?

A. Yes, sir.

Q. And the switching service is performed gratis, so far as you know?

A. Yes, sir.

46 Q. Do you know whether or not Monroe, Rockwood, Toledo, and Port Huron are within the same schedule of rates east as Detroit?

A. Yes, sir.

Q. They are all grouped for freight purposes?

A. Yes, sir.

Q. Why don't you have a siding?

A. It would be utterly impossible to get a siding to our mill, I should judge; it can't be done.

Q. How far are you from the Michigan Central Railway yards?

A. I should judge we were about three-quarters of a mile.

Q. How far are you from the Grand Trunk Railway yards?

A. About a quarter of a mile.

Q. Do you know when the Commercial Mills were built—your mills?

A. In 1855.

Q. Do you know what has been the practice of free cartage?

A. Ever since I have been in business we have had free cartage.

Q. How long have you been in business?

A. Since 1876, with my father.

Q. What roads do the free cartage for you here in Detroit?

A. The Michigan Central and Grand Trunk.

Q. How long has the Michigan Central and Grand Trunk done this?

A. As long as I can remember. I don't remember when they did not do free cartage for east-bound business.

Cross-examination. Mr. POND:

Q. How about west-bound business?

A. We don't do any west-bound business.

Q. You say that the Union Mills, and Stott's Mill, and these mills at Monroe, Rockwood, Toledo, and Port Huron are competitive with your mills?

A. Yes, sir.

Q. Is not every mill in the West competitive with your mill?

A. Yes.

Q. Just as much as these mills?

A. Hardly.

Q. Where do you ship your flour?

47 A. Throughout New Hampshire, Vermont, Maine, New York.

Q. Flour throughout the West is shipped to those same places, isn't it?

A. Yes, but it is a different class of flour.

Mr. KIRCHNER. They are not all grouped with Detroit for the same purposes.

Q. What is the difference?

A. The flour that comes from the West is spring wheat flour and sells for a different price.

Q. But the flour that comes from other places in Michigan and the flour that comes from Illinois and Wisconsin—

A. (Interrupting.) Is not the same class of flour as Michigan flour.

Q. Illinois flour is, isn't it?

A. It does not sell at the same price.

Q. It is made from winter wheat, isn't it?

A. Yes, sir; but it is not Michigan flour in the Eastern markets.

Q. What flour does compete with Michigan flour in Eastern markets?

A. Michigan has a flour peculiar to its own State.

Q. In what respect?

A. In color.

Q. The wheat raised about Monroe, and flour made there, does not differ in color from flour made at Toledo?

A. A great deal of the Toledo wheat is from Michigan, and it is a sharp competitor.

Q. Wheat raised in northern Indiana and Ohio is similar to that raised in Michigan, isn't it?

A. No, sir.

Q. Where do you draw the dividing line?

A. I should draw the dividing line right around Toledo and just in the eastern northwest corner of Ohio.

Q. Take the southern tier of counties in Michigan—Lenawee, Monroe, Branch, St. Joseph, and Cass—is there any difference in the flour and wheat from these and the flour made by the mills in Detroit?

A. No, sir.

Q. There are mills all through that southern tier of counties, are there not?

A. I suppose so.

Q. So flour from those places competes with your flour?

A. Yes, sir.

Q. You say if you did not receive free cartage you would have
48 to go out of business. If your rate was as much lower than your free cartage you would not have to go out of business, would you?

A. I would if my competitors didn't have to pay cartage.

Q. Suppose an open rate were made that would give you the same result as you get now by free cartage; you would still be at a disadvantage with your competitors, would you not?

A. I don't understand what you mean by an "open rate."

Q. You say it costs six dollars a car. Suppose the rate for your Eastern markets was made so it would be six dollars a car lower than it now is; the result would be the same as giving you free cartage, would it not?

A. It would depend upon the rate made to my competitors.

Q. I mean to all parties.

A. No, sir; it would not be the same.

Q. Why?

A. For the reason that my competitors would be able to get their flour on board cars without any expense to themselves.

Q. So would you, would you not?

A. No, sir; I would have to cart it to the railroad.

Q. Then the trouble you are in grows out of the fact that these other mills are situated nearer the railroad facilities than your mill is?

A. Yes, sir.

Q. You say that the Union Mills have a track connected with the Michigan Central?

A. Yes, sir.

Q. Do you know who owns that track?

A. No, sir; I don't.

Q. You don't know, do you, that that track was constructed by the Union Mills Company, and is owned by the Union Mills Company?

A. No, sir.

Q. Where is this other mill that you speak of—Stott's mill?

A. Out on Grand River ave.

Q. Then it must be on the line not only of the Michigan Central, but of the Lake Shore and Grand Trunk Railroad that runs to Port Huron?

A. I don't understand that it is on the line of the Michigan Central; on a branch of the Michigan Central.

Q. On the Detroit & Bay City?

A. I presume it is.

Q. The three roads run side by side there, don't they—the Lake Shore, the Detroit & Bay City, and the Chicago & Grand Trunk, or the
49 Chicago, Detroit & Grand Junction road, or whatever you call it? I suppose there must be a switching track on the Michigan Central into that mill.

A. Yes, sir.

Q. Do you know who constructed that switch track and who owns it?

A. No, sir; I don't.

Q. If the Union Mills Company constructed its own track and owns it, it has made an expenditure in that direction which you have not made with reference to your mill, hasn't it?

A. I presume so.

Q. You say that Port Huron is in the same group of stations as Detroit?

A. Yes, sir.

Q. That is, that the rates from Port Huron east are the same as from Detroit?

A. Yes, sir.

Q. The distance from Port Huron to Eastern markets is shorter than from Detroit, isn't it?

A. I don't know as to that.

Q. You know, don't you, that Port Huron lies further to the east than Detroit?

A. If I remember rightly, I believe it lies on the same line running north. I don't understand that it lies any further east than Detroit.

Mr. KIRCHNER. Geographically?

A. No, sir.

Mr. POND:

Q. Your shipments of flour, I take it, are in carload lots?

A. Yes, sir.

Q. And the railroad companies cart it free and load it free?

A. Yes, sir.

ALMOND B. ATWATER, a witness produced on behalf of the respondent, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. You live in Detroit?

A. Yes, sir.

Q. Will you please state what your business is?

A. I am superintendent of the Chicago & Grand Trunk and of the Detroit, Grand Haven & Milwaukee railways.

Q. How long have you occupied that position?

A. Since June, 1885.

50 Q. Do you know what has been the practice of railroad companies throughout the United States as to running their cars free of charge over sidings or belt lines to the stores or warehouses of shippers or consignees for the purpose of receiving and delivering freight free of charge for such service?

A. As far as I know, it is a general practice to do so.

Q. How, then, would shippers not on sidings or belt lines fare in that respect?

A. They would be placed at a disadvantage in having to haul their freight to the company's siding.

Q. Either to or from the railroad company?

A. Either to or fro; yes, sir.

Q. Do you know how far such disadvantages have been equalized in any way?

A. In some places where there is free cartage it has equalized the disadvantages.

Q. How long, as far as you know, has this cartage system prevailed?

A. I know very little about that. There has been free cartage in some places, I know.

Q. For how long?

A. I spent a number of years over in Canada and since I have come back here in 1882, I have known of it in some places.

Q. State whether it has been the practice of railway companies to make a switching charge against competing roads for running their cars on sidings and belt lines when they would render the same service gratis for freight coming or going over their own lines.

A. As far as I know it has been the practice to make a charge for switching for other companies when the same service would be rendered gratis for goods coming or going over their own lines.

Q. And who pays the switching charge in such a case?

A. As far as I know it is absorbed by the company handling the freight or handling the shipments.

Q. Are you familiar with the respondent's railroad station at Grand Rapids?

A. Yes, sir.

Q. What can you say as to the expense of receiving and delivering freight at Grand Rapids under a free system as compared with the expense of constructing and operating belt lines or sidings to stores or warehouses of consignees and shippers, as the case may be?

A. The expense is far less than to pay interest on the cost of building tracks into places.

51 Q. Aside from the expense, what, if any, advantage has the free cartage system over the practice of delivering at sidings or belt lines?

A. The cartage system is of advantage to shippers in putting them all on the same footing.

Q. Do you know whether the two cents per hundred pounds paid for cartage at Grand Rapids includes any service other than the carting of the goods?

A. Yes, sir; it includes the collection of the freight bills and the soliciting of freight.

Q. Do you think that the respondent's road could get any business at Grand Rapids unless it did free cartage?

A. It would get very little for competitive points.

Cross-examination. Mr. POND:

Q. What is the difference between belt lines and switching tracks? What distinction do you make?

A. Do you mean by switching tracks, tracks to an industry, or tracks to a mill?

Q. Yes; I mean tracks running from the main line of a road into business places, such as mills, manufactories, lumber yards, etc.

A. Usually a belt line would have such sidings off the belt line to those industries.

Q. A belt line would be, in effect, an extension of the main track?

A. In some respects; yes, sir.

Q. The term "switch tracks," as you use it in giving your testimony, would mean those tracks that run into business places from the main line; not tracks that are laid for the purposes of making up trains?

A. No, sir; I would not exactly use that term. I would say business tracks.

Q. Sometimes such tracks are called switch tracks, but tracks laid in yards for the purpose of making up trains are also called switch track?

A. Yes, sir.

Q. Are there many switch tracks along the line of the respondent company's road into places of business?

A. Do you refer to Grand Rapids or to any place?

Q. I refer to any place.

A. Yes, sir; a good many.

Q. Isn't it a fact that it is the practice of railroad companies to run these switch tracks into places of business that are accessible whenever asked, and whenever the shipper will furnish the right of way, and in exceptional cases, pay a part of the cost of construction?

A. It is very often done.

52 Q. The usual practice is to require the right of way to be furnished, isn't it?

A. Yes, sir; I think so, as far as I know.

Q. In fact, it is a universal practice, isn't it?

A. Yes, sir; I think it is, unless some other right of way had to reach it, not belonging to the industry.

Q. Ordinarily the only industry interested undertakes to furnish the right of way from the railway company's line right to the end of its track, don't it?

A. Ordinarily.

Q. And the custom is, and has been for years, when the owner of an industry of that kind would furnish the right of way and ask for it, that the track would be put in and cars destined for him, either to load or unload, in carload lots, would be switched onto such tracks without charge?

A. That is usually the case at competitive points, not so much at other points.

Q. Isn't it so on your road, whether they are competitive or not?

A. In some cases on our road the shipper pays for the siding.

Q. Where it is a point not competitive the shipper pays for the siding?

A. Not always so, but in some cases.

Q. But it very seldom, if ever, that a railroad company on its own motion acquires the right of way and builds a track in to an industry, isn't ?

A. I think so.

Q. So that practically the owner of the industry provides access for the railroad company to his premises?

A. Yes, sir.

Q. And in consideration of that the cars destined for him are put on this track free?

A. Yes, sir.

Q. Those tracks are ordinarily used only for cars wholly loaded, for traffic in carload lots?

A. Ordinarily; yes, sir.

Q. At Detroit the road of the respondent company is as accessible to business generally as the other roads, is it not?

A. I hardly think it has as many sidings into industries as the Michigan Central, but it has a good many.

Q. I do not now confine it wholly to the business accessible for sidings, but to the business generally to the town, to the business that comes and goes in less than carload lots?

A. Yes, sir; I think they have about the same facilities.

Q. So there is no occasion at Detroit for the Chicago & Grand Trunk to do free cartage in order to put itself on an equality with other roads, is there?

53 A. I don't know that there is.

Q. Why, then, does it do free cartage at Detroit?

A. I don't know.

Q. At Grand Rapids you think that it is necessary that it should do free cartage in order to do the business?

A. In order to get a share of the business; yes, sir.

Q. At Grand Rapids, does it do free cartage for traffic that is shipped or consigned in carload lots?

A. As far as I know, they do; but I know but very little about the freight arrangements.

Q. But it is your understanding that the free cartage is given to shippers in carload lots as well as in smaller quantities?

A. In certain commodities, I think so; yes, sir.

Q. Do you remember the kind of commodities?

A. I really know but very little about that.

Q. Is the object in giving free cartage to equalize the cost of business as between the shippers and consignees?

A. My understanding of the object of free cartage at Grand Rapids is to place the Detroit, Grand Haven & Milwaukee Railroad on the same footing with other roads.

Q. Free cartage is not given to enable a shipper who is further from the road than another shipper to be put upon an equal footing with the other shippers, is it?

A. It has that effect; it may not have been given for the purpose.

Q. It has the effect of putting a man a long way from the freight house on an equality with one near to it?

A. I should say so.

Q. You have stated that unless free cartage was given to parties who have these tracks running into their places of business, they have an advantage over shippers or consignees who do not have them?

A. Yes, sir.

Q. Isn't it a fact that land situated right near the tracks of a railroad company that can be accommodated with these business tracks is more valuable for manufacturing than land further away?

A. No, sir; not always.

Q. Not always; but isn't it, as a general rule, true that land that is accessible to a railroad or that has business tracks commands a better price in the market than similar land some distance off?

A. It would not be so in a city, I think. A man might have a factory back in a city away from a railroad where the land is far more valuable than it would be close to a railroad.

Q. It might have; but isn't it true that for a series of years
54 business places near to railroad tracks or so near as to be accessible by these business tracks have commanded higher prices and higher rental than like property further away, so that the railroads can only be reached by carting?

A. That is so in some cases.

Q. It is so as a general rule, now, isn't it?

A. I don't think so, Mr. Pond; I don't think so.

Q. I put it upon the assumption that the party who is further away will have the same rate of freight, and must do his own carting?

A. I should say that the location on a railroad would be a most desirable one; but there might be other reasons which would make the property away from the railroad more valuable.

Q. Take the case of the flouring mills that the last witness testified about. Would not the location for a flouring mill, where the flour has to be manufactured and shipped to the East, be more valuable if it adjoined a railroad, so that cars could be put right in front of it for loading?

A. Without free cartage, as I said before, the location on a railroad track would be more desirable.

Q. Then this free cartage equalizes the value of property besides other things, does it?

Mr. KIRCHNER. He has not said so. Do you assent to that?

WITNESS. I don't know as I do.

Mr. POND. Do you dissent from it?

(Question not answered.)

Q. How about this switching charge to competing lines. The switching charge is made whether the company desiring the switching done is a competing company or not, isn't it?

A. I don't understand you.

Q. You said, in answer to a question by Mr. Kirchner, that a railroad company having tracks into a place of business charged companies for switching to that place of business?

A. Yes, sir.

Q. Charges for switching into that place of business are made for cars whether for other competing roads or not?

A. Yes, sir.

Q. The company that does the switching is to an expense in doing it, isn't it not?

A. Certainly.

Q. And it could not very well afford to do the switching for nothing?

A. No, sir.

Q. You say that in such cases the railroad company on whose behalf the cars are switched absorbs that switching charge?

A. Yes, sir.

55 Q. That is not universally true, is it?

A. It is, on competitive business, I think.

Q. Ah, yes. If one road wishes to reach business on the tracks of a competing road will pay the switching charges in order to get that business?

A. Yes, sir.

Q. You have a station on the respondent company's road by the name of Ionia, haven't you?

A. Yes, sir.

Q. Is that station grouped with Grand Rapids; that is, are the rates to Eastern points the same as from Grand Rapids?

A. I know very little about it.

JAMES MCQUEEN, Jr., being duly sworn on behalf of the respondent to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. You live in Detroit?

A. Yes, sir.

Q. How long have you lived here?

A. Thirty-three years.

Q. What is your business now?

A. I am manager of the West Shore Fast Freight Line.

Q. How long have you been engaged in that business?

A. I have only been with the line since the 1st of August last.

Q. Prior to that were you engaged in railroading?

A. Yes, sir; I was the assistant general freight agent of the Detroit, Grand Haven & Milwaukee Railway Co.

Q. For how long?

A. In that particular position for three or four years. Prior to that I had been with them since April, 1870.

Q. Has the West Shore Fast Freight Line any alliance with the Grand Trunk?

A. It is not a corporate institution. We simply ship over it. We operate over the West Shore road.

Q. Do you know what has been the practice of railroad companies throughout the United States to do free carting as a means of securing traffic?

A. Yes, sir.

Q. Please state what it was.

A. I have known free cartage to prevail at various points for some years back.

Q. How many years back?

A. I should say ten, at least.

Q. State whether the expense of cartage has been regarded as a reasonable and legitimate means of procuring business.

56 A. Yes, sir.

Q. What circumstances and conditions determine the question whether free cartage shall be practiced at any railway station?

A. I should say the location of the different depots to the business center of the town, and the competition generally.

Q. Do you know whether it has been the practice of railway companies in the United States to run their cars free of charge over sidings and belt lines to the stores and warehouses of consignees, for the purpose of receiving and delivering freight, free of charge for such service?

A. Yes, sir.

Q. How long have you known that practice to exist?

A. Practically during my railway experience.

Q. Whether, contemporaneously with such practice, it has also been the practice of the same railway companies to make a switching charge against all railroad companies for running their cars on such lines to the stores or warehouses of shippers or consignees, for the purpose of receiving or delivering freight?

A. They do make a charge, but I have known of cases where they have switched for competing lines free; but it has been under a specific agreement, having a bearing, I suppose, on their own separate sidings to the industry.

Q. In the absence of any special agreement, a charge was made as a switching charge when it was done for another company?

A. Yes, sir.

Q. And by whom, under such practice, is the switching charge paid generally?

A. My experience shows that it is paid by the railway company carrying the property.

Q. Are you familiar with the respondent's railroad and station at Grand Rapids?

A. I am.

Q. What can you say as to the expense of receiving and delivering freight at Grand Rapids under a free traffic system, as compared with the expense of constructing and operating belt lines or sidings to the stores or warehouses of consignees and shippers, as the case may be?

A. I should say the cartage system was cheaper.

Q. Aside from the expense, what, if any, advantage has the free-cartage system over the practice of delivering at sidings or belt lines?

A. It places everybody on a parity and does away with any discrimination.

Q. It puts all shippers on an equality?

A. Yes; it puts all shippers and consignees on an equality.

57 Q. Do you know whether the two cents per hundred pounds paid for cartage at Grand Rapids pays for any other service than the cartage of the goods?

A. It covers the cartage and the putting onto and taking off the teams, the expense of canvassing, the responsibility of collecting the charges, and the safe delivery of the goods.

Q. Would it be possible for the respondent road to obtain for its railway a due and proper or considerable part of its traffic at Grand Rapids without either continuing the practice of free cartage or extending its tracks into the business center of the city?

A. I think not.

Q. Did you hear the testimony of Mr. Henkel?

A. Yes, sir.

Q. Do you know whether there are mills at Monroe, Rockwood, Toledo, and Port Huron?

A. Yes, sir.

Q. That ship East?

A. Yes, sir.

Q. Do you know whether they are situated on sidings?

A. Yes, sir.

Q. Where switching charges are rendered gratis?

A. Yes, sir; on the siding to the mill, and they have the same basis of rates as they have at Detroit—78 per cent.

Q. That is, these four places I have named are grouped with Detroit?

A. Yes, sir; they are all on one basis of rates.

Q. State whether the railway companies in these places perform these switching services gratis on these sidings.

A. Yes, sir.

Q. Do these mills compete with Detroit?

A. I so understand.

Cross-examination. Mr. POND:

Q. At what places in the United States has it been for years the practice to do free cartage?

A. It has been the practice at different points, I will say from my own knowledge. I would say that *that* it has been done at Grand Rapids, Detroit, Battle Creek, Lansing, Jackson, and Cleveland—practically the same territory covered by Mr. Reeve's testimony.

Q. All the places that you have named in Michigan are places reached by roads in the Grand Trunk system, so called, are they not?

A. Yes, sir.

58 Q. What do you know about free cartage being done at Cleveland? Do you know anything about it of your own knowledge?

A. Only what the officials of certain lines have told me.

Q. You know it only by hearsay. Do you know when the giving of free cartage began in Cleveland, and under what circumstances?

A. I do not.

Q. Before the interstate commerce law was passed, whether it was considered legitimate to pay rebates to get business?

A. I don't know whether it was considered legitimate or not; it was done.

Q. It was done as freely as free cartage was done, was it not?

A. I can't say that; I don't think it was.

Q. It was done for the same alleged reasons—it was necessary to do it in order to get business?

A. I don't know. That ought to be qualified. Sometimes they wanted more than their share of business when they offered rebates.

Q. That is, the railroad company did?

A. Yes, sir.

Q. How would you determine what share of business the company was entitled to?

A. That would depend on circumstances.

Q. If you were employed by the Grand Trunk, you would think their share would be a large share?

A. I might be inclined to be a little bit biased.

Q. You have spoken of Grand Rapids. About what share of that business would be the legitimate share of the Detroit, Grand Haven & Milwaukee Railway?

A. I am not connected with that road at the present time.

Q. You stated you thought it could not get its proportionate share of the business unless it did free cartage?

A. Yes, sir.

Q. The business which is delivered free of switching charges, upon switching or business tracks, is business that is transported in carload lots, is it not?

A. Not always.

Q. Well, as a general rule?

A. In consideration of the volume of business, it is practically so.

Q. And the business that goes onto switching tracks or business tracks in carload lots is loaded or unloaded, as the case requires, by the consignor or consignee, is it not?

A. I presume so, because the railway companies are not supposed to have their men on sidings or tracks.

Q. You know so, don't you?

59 A. There may be exceptions to it.

Q. There are exceptions to all general rules, I believe, and that is especially true of railroads where there is sharp competition, isn't it?

A. Yes, sir.

Q. They do all sorts of exceptional things?

A. Well, I should want to qualify that somewhat.

Q. Well, a great many exceptional things?

A. I presume so.

Q. I mean things out of the ordinary course?

A. I mean things that some people might take exception to.

Q. What I mean is, they make exception to the general rules upon which they act?

A. There is no rule that is not broken at some time.

Q. Do you know anything about the conditions upon which these business tracks are usually constructed?

A. Only in a general way.

Q. They are generally constructed, when they leave the right of way of the railroad company, upon rights of way furnished by the owner of the business?

A. Generally; unless the siding happens to be entirely on the railway company's property.

Q. But ordinarily such a track runs off the right of way of the railroad company, don't it?

A. In many cases; yes, sir. There are a great many industries, however, located right on the line.

Q. But as business develops and it becomes necessary for the railroad to use its right of way, it takes off these business tracks and puts them onto adjoining land?

A. Yes, sir.

Q. You have said that a railroad company having switching or business tracks reaching the business of a customer charges competing companies for switching cars to and from those business tracks?

A. Yes, sir.

Q. They make a charge for switching, whether it is to competing companies or companies not competing, don't they?

A. They make a charge to any company, except in certain specific cases, that are rare.

Q. Oh, certainly; in some cases companies make reciprocal arrangements; they switch for each other at a nominal charge?

A. Yes, sir.

Q. And they do it upon the assumption that the business is such that at the end of a year it will be about equal, and will hardly be worth while for them to keep accounts and make collections backward and forward?

60 A. That may be the reason.

Q. You say it is usual for the company doing the switching to absorb that charge?

A. Yes, sir; there are exceptions to that also.

Q. Is not this the fact, that where it can not get the business without absorbing the charge, it absorbs it where it can take the business?

A. That is about the fact.

Q. This absorbing the charge is a means of getting a business at tariff rates which would go by some other road if the charge was not absorbed?

A. Yes, sir; it puts them on an equality with the other line.

Q. The tariff by both lines being the same, the road absorbing the charge makes that allowance to get to business?

A. Yes, sir; I believe that is legitimate.

Q. You do not mean by "legitimate" lawful?

A. Recognized.

Q. In railway circles?

A. I don't know but I might as well say both.

Q. Do you know about the volume of business that the respondent company handles at Grand Rapids?

A. No, sir; I am not connected with the line now.

Q. Do you know what proportion of the business it handles in less than carload lots bears to carload lots?

A. I could not answer that.

Q. It is very seldom that any railway company delivers upon switching or business tracks in less than carload lots?

A. It has been done; I don't know what percentage of it.

Q. It is very exceptional, isn't it?

A. I could not say as to that.

Q. It is not considered legitimate, to use your term, is it?

A. Hardly.

Q. And these switch or business tracks are not constructed for the purpose of handling business in less than carload lots?

A. Sometimes.

Q. I say not usually.

A. Well, usually, if a man did the most of his businessin small lots he would not want a siding.

Q. His business would go to the nearest freight house?
A. Yes, sir.
Q. He would go to the freight house to get it?
A. Yes, sir.
Q. Then, when you say that it is cheaper for the respondent company at Grand Rapids to do cartage than to build the tracks that it
61 would be necessary for it to build to get to the business you refer, do you not, to business that is transported in carload lots?
A. Not necessarily.
Q. Why not necessarily?
A. Because it has been necessary, in my experience at Grand Rapids, for them to put cars with small lots of freight alongside of these very parties' doors.
Q. You have already said that it is not usual—that it is exceptional?
A. I say it has been done, and it is being done to-day.
Q. Do you know it is done to-day?
A. I have reason to believe it is done to-day.
Q. Can you say it is?
A. I could not; I am not an officer of that company.
Q. Your being an officer of that company would not enable you to know that other companies delivered on these business tracks in less than carload lots?
A. I qualified that; I said when I was an officer I knew that had been done.
Q. You knew it by hearsay or by information that was given you?
A. Well, I satisfied myself of it to my own satisfaction.
Q. How did you satisfy yourself?
A. By putting a watch on it.
Q. It is a very common thing for shippers to represent to one company that another company is doing business in a certain way when it is not true?
A. That has been done quite frequently.
Q. It is an attempt to pit one company against another?
A. Yes, sir.

Redirect. Mr. KIRCHNER:

Q. Do you know of the Michigan Central and Lake Shore having sidings at Lansing or Jackson, or at both places?
A. Yes, I know they have.
Q. Do you know whether free delivery is made to people on these sidings or belt lines?
A. By those companies?
Q. Yes.
A. I can't answer that positively as to their practice to-day. It was the case a year ago; whether it is so now or not I can't say.
Q. How long had that been the custom of those companies at those places?
A. Practically, as I said, ever since I can remember; ever since my railroad experience began.

62 Recross. Mr. POND:

Q. Your railroad experience runs back how long?
A. A little over twenty-five years.

Q. Can you name a single side track running to business places at Lansing from the Michigan Central tracks one year ago, or ten years ago?

A. Oh, no; I could not say specifically as to that; I could not say as to those roads.

Redirect. Mr. KIRCHNER:

Q. The question was directed to those two roads at those two places.

A. I can't say as to that.

Q. Do you know what the practice was two years ago, with reference to the practice of the delivery of freight at Jackson or Lansing by the Michigan Central or Lake Shore roads?

A. Five years ago it was their practice.

Q. At those places?

A. Yes, sir; to furnish a delivery on sidings that they had constructed; but that has been brought out before; it is a common thing to-day.

Recross. Mr. POND:

Q. About these mills you have spoken of at Port Huron, Toledo, Monroe, and Rockwood; are all the mills at those places on business tracks or switch tracks?

A. All of them?

Q. Yes.

A. I can't say that.

Q. There may be mills at some of these places that are not reached by railroad tracks?

A. There may be.

JOHN W. LOUD, a witness produced on behalf of the respondent, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. Where do you live?

A. In Detroit.

Q. What is your business?

63 A. I am traffic manager of the Detroit, Grand Haven & Milwaukee Railway.

Q. How long have you held that position?

A. About two years and a half.

Q. Prior to that time what was your business?

Q. General freight agent of through traffic for the Grand Trunk.

Q. Where?

A. In this State.

Q. And for how long?

A. Not quite three years.

Q. And prior to that?

A. I was freight agent of the Grand Trunk Railway in Toronto.

Q. How long?

A. Over five years.

Q. And prior to that?

A. I was with the Grand Trunk Railway for about nine years prior to that, some part of that time being agent at Hamilton and chief clerk in the general agent's office in Montreal.

Q. Did you have any railroad experience prior to that time?

A. Yes, sir.

Q. Where?

A. I was with the Midland Railway Company of England for eleven years. My railway experience extends over the time since 1861 until now.

Q. What has been the practice of railway companies throughout the United States as to doing free cartage as a means of securing traffic at stations on their respective lines of railway?

A. It has been the practice of some companies at some points.

Q. Can you name them?

A. Yes, sir; within my recollection it has been done by the Grand Trunk for about fourteen years; by the Detroit, Grand Haven & Milwaukee Railway at Grand Rapids for a number of years, and by some other companies at various points—these Michigan points that have been mentioned—Battle Creek, Lansing, etc. I have had some knowledge of it at those places, and I have always understood that it has been done at Cleveland.

Q. How about St. Louis, Mo.?

A. I notice from the interstate commissioner's reports that it has prevailed largely in the South; that is my only information as far as that is concerned.

64 Q. State whether the expense of free cartage has been regarded as legitimate and a reasonable means of procuring business.

A. Yes, sir.

Q. What circumstances and conditions determine the question of whether free cartage shall be practiced at any railway station?

A. The terminal disabilities of one company as compared with another.

Q. And as a means of equalizing that?

A. As a means of equalizing it to the one disadvantageously placed.

Q. To the shipper?

A. No; equalizing it to the railway.

Q. How does that affect the shipper or consignee?

A. It gives the shipper or consignee the choice of more routes on the same terms.

Q. Does it not also place them all upon an equality?

A. Oh, I didn't understand your question to imply that. Yes, sir; free cartage puts all shippers or consignees on a parity with each other by taking from or delivering the goods at the store door.

Q. Do you know whether it has been the practice of railway companies throughout the United States to run their cars free of charge over sidings or belt lines to the stores or warehouses of shippers or consignees, for the purpose of receiving or delivering freight, free of charge for such service?

A. Yes, sir.

Q. How long have you known that practice to exist?

A. In the States I have known it to exist since I have been here, say over five years. I believe it was in existence for many years before, but my duties did not bring me in contact with it.

Q. State whether cotemporaneously with such practice it has also been the practice of some railroad companies to make a switching charge against all railroad companies for running their cars onto such sidings or belt lines to the stores or warehouses of such shippers or consignees for the purpose of receiving or delivering freight.

A. Yes, sir.

Q. Do you know of any special instances here in Detroit?

A. We switch for all the companies in Detroit who ask us to do so, and most of the companies switch for us when they have points we want to reach. Some of them have no sidings.

Q. For instance, if you want to reach an establishment on the Michigan Central belt line, what is the switching charge?

A. The Michigan Central charges us two dollars for reaching a
65 place having a siding into it. They charge us three dollars if we want a car placed at one of their team tracks for unloading.

Q. Where they themselves have done the business or expect to do the business, what is the charge for the same service, if you know?

A. I can't say they have made any difference.

Q. Do they make any charge for this switching to the parties themselves?

A. They make no charge.

Q. You mean to the parties themselves?

A. Yes, sir; they make no charge.

Q. When a charge is made for such switching service, by whom is it paid?

A. As a rule by the railway, but sometimes by the consignees or shipper, as the case may be.

Q. What determines it?

A. As a rule, if you have interstate traffic, I would say the road can not do it. If it was State traffic, possibly the question whether it was competitive or noncompetitive might make a difference.

Q. I dare say, of course, that you are familiar with the respondent's line of railway at Grand Rapids?

A. Yes, sir.

Q. And its station there?

A. Yes, sir.

Q. What can you say as to the expense of receiving and delivering freight at Grand Rapids under the free-cartage system, as compared with the expense of constructing, maintaining, and operating belt lines or sidings to stores or warehouses of shippers or consignees, as the case may be?

A. I consider that free carting there is more econominal than it would be to maintain and operate sidings into the city.

Q. Aside from the expense, what, if any, advantage has the free-cartage system over the practice of free delivery at sidings or belt lines?

A. The free-cartage system is more uniformly just and equitable.

Q. To whom?

A. To shippers and manufacturers alike. Under a free cartage we take from or deliver to all alike, at the doors of all. But in case of free switching it would be only the shipper who had the siding to his warehouse who would get free service; whereas his neighbor, who has the very same kind of goods, might have to pay two or three cents a hundred pounds in order to get them if he had no such siding.

Q. At Grand Rapids it costs the company two cents per hundred pounds to do the carting?

A. Yes, sir.

66 Q. What does that include?

A. It includes the delivery, the collection of the freight, the expense of collection of freight charges, canvassing for freight, and looking after our interests generally in those connections.

Q. Would it be possible for the respondent company to obtain for its line a due and proper or any considerable part of the traffic at Grand Rapids, without either continuing the practice of free cartage or extending its tracks into the business center of the city.

A. I don't consider that we could get what I would consider a fair proportion of the business without having to do free cartage or without putting a siding right down to the city, as our competitors are located in the central part of town, and have sidings in many instances alongside of the principal industries.

Q. Are you familiar with the published schedules of freight rates of the Detroit, Grand Haven & Milwaukee Railway?

A. Yes, sir.

Q. I will ask you whether it makes any discriminations between freight that is loaded by the consignor or shipper and unloaded by the consignee and that which is loaded and unloaded by the railway company?

A. I don't know that I could answer that question in reference to Grand Rapids, because where we team the goods we load them and unload them in all cases.

Q. That is not the question. What about your schedule?

A. Our schedule makes no difference.

Q. Have you that schedule here?

A. Yes, sir.

Q. Will you produce it?

A. Yes, sir [producing schedule].

Q. Have your published tariff rates ever made any such distinction?

A. Not to my knowledge. Since I have been on the Detroit, Grand Haven & Milwaukee the tariffs have been prepared under my superintendence, and I do not recollect of such a distinction as I am now asked about.

Mr. KIRCHNER. I do not care to encumber the record with any published tariff rates, for the reason that the question is entirely immaterial.

Cross-examination. Mr. POND:

Q. So that the question is really what the classification shows?

67 A. The official classification shows that certain articles should be loaded and unloaded by the shippers and the consignees, but those articles are limited. The only things I know of in that are bulk articles, like machinery, boilers, and such like things, and some other articles of that kind.

Redirect. Mr. KIRCHNER:

Q. They are all articles which you do not cart free, are they not?

A. Those articles in the classification which provides that the consignor or shipper and the consignee are to load and unload them, we would not cart on account of the weights. In many instances the official classification provides for five tons.

Q. So that whenever the official schedule provides for loading or unloading by the shipper or consignee, it covers goods you would not cart free anyway?

A. In consequence of their bulk, we would not do it anyway.

Q. Is it a fact? I am not asking for the reason.

A. Yes, sir; as far as my knowledge goes.

Recross. Mr. POND:

Q. What kind of traffic do you cart over there at Grand Rapids?

A. What may be usually termed as package freight. That would take the higher classes; usually the first five classes and some articles in the sixth.

Q. What articles in the sixth?

A. Sugar and flour.

Q. Any others?

A. I could not tell you from memory. My answer is sufficiently broad to cover the thing as far as I can give it to you.

Q. Under the official classification sugar and flour in carload lots are classed as what?

A. Sixth class.

Q. And are to be loaded and unloaded by——

A. (Interrupting.) No, sir.

Q. Have you any team tracks in Grand Rapids?

A. We have some team tracks at our depot.

Q. What sort of traffic do you receive and deliver on those team tracks?

A. Probably, in loading flour, we would load flour upon it, and probably other carload freight. If a car were available when we were called to team it there we would perhaps load direct from the team into the car.

68 Q. Ordinary traffic is received upon team tracks, and it is loaded or unloaded as it may be required by the consignor or consignee, isn't it?

A. It is, except where cartage is performed; where cartage is performed it does not follow at all.

Q. That is what I am getting at. Where free cartage is not done, traffic which is received or delivered on team tracks is loaded and unloaded, as the case requires, by the shipper or the consignee?

A. That is the rule.

Q. At Grand Rapids you load and unload a large part of the traffic you receive on team tracks?

A. Certainly, if we deliver it—give free carting—we certainly load and unload it.

Q. Do you give free cartage for furniture in Grand Rapids in carload lots?

A. Yes, sir.

Q. Just tell us, if you can, what kind of property you do not give free cartage to at Grand Rapids?

A. Grain, lumber, and that kind of traffic.

Q. You say "that kind." What else?

A. In our phraseology it covers the class of traffic in that sense.

Q. You mean grain and lumber and *and* like traffic?

A. Yes, sir; but my answer "package freight" covers it more definitely than any other way I could express it.

Q. What do you mean by that?

A. Flour is package freight. Grain is in bulk; it is not in barrels, and lumber is not in packages.

Q. I understand you now. You load and unload and give free cartage to all property which is not transported in bulk without reference to whether it is transported in carload lots or not?

A. Yes, sir; there are some exceptions to that; plaster is in packages, but we do not give free cartage to it.

Q. Why don't you?

A. That is State traffic, and the rate on it is such that we do not consider we can afford to pay cartage on it.

Q. If you should make your tariff two cents a hundred less than the tariff of your competitors, it would put you in the same position you would be in if you gave free cartage and your competitors did not, would it not, if you had the same tariff?

A. Yes, sir.

Mr. KIRCHNER. Why, no; because this two cents includes other services.

69 WITNESS. Certainly; exclusive of the other service. We get a canvassing service from it, and also a guarantee as to the freight charges.

Q. Who does your cartage at Grand Rapids?

A. Hendrie & Co.

Q. Do they do it under a written agreement?

A. No.

Q. Has there ever been a written agreement?

A. I say no—if it was so it was before I took charge.

Q. Are you able to say there is not an agreement which controls at the present time?

A. My impression is there is not a written agreement.

Q. Are you able to give us the terms of that agreement, and will you do so?

A. I could not give it to you from memory.

Q. If it is not written, how can you give it except from memory.

A. I have a memorandum of what I understand to be the agreement.

Q. You have named certain places in Michigan and Cleveland, Ohio, where it has been the practice for years, you say, to do free cartage. Every place you have named in Michigan is reached by the Grand Trunk, or by some road operated in the Grand Trunk system, is it not?

A. Yes, sir.

Q. You say that the giving of free cartage has been considered a legitimate method of obtaining business at competitive points, don't you?

A. I don't think I said that.

Q. You said it had been carried on as a reasonable method of getting business?

A. Yes; but I did not qualify it as competitive, did I?

Q. Do you know of its being done anywhere else in Michigan, except at competing points?

A. It is done by the Grand Trunk Railway at Port Huron.

Q. You are certain of that?

A. I think so.

Q. It is done by the Grand Trunk at Port Huron on what business?

A. On business to and from the East; the same as it is done at Detroit, I think.

Q. Is it done at any other place in Michigan at which the Grand Trunk is not competing for business?

A. Not to my knowledge.

Q. Before the passage of the interstate-commerce law it was considered legitimate to give special rates to get business, was it not?

A. Yes, sir.

Q. And to give rebates?

70 A. Probably other companies knew more about that than I did. I did not have much to do with rebates. I know it was said to be notorious that some companies did do it.

Q. It was notorious that special rates were given to large shippers?

A. I have no doubt of it.

Q. That was considered legitimate?

A. I don't know whether you would call it legitimate or not.

Q. What distinction do you draw between a siding or switch track and a belt line?

A. I call a siding, or, if you so permit, a switch track—in my phraseology I should call the switch track a siding. I should call a siding, however, a track for the delivery of freight into or alongside a factory or yard, or in case of our own road from Detroit to the Milwaukee Junction, I should call that a siding. A belt line I should take to be a service around the city, or nearly so. Originally I understood a belt line to mean a line that went around the city. Take it in Detroit here, they call the Michigan Central's track a belt line, but that is not exactly true.

Q. That is a spur track leading out of the Bay City road down towards the river?

A. Yes, sir; but with the Bay City road it makes it almost a belt line.

Q. These tracks that lead into these places of business run out of the main tracks, or what you call a spur track—the main track of a road, don't they?

A. Either from that or from a siding run off that.

Q. Do you know anything about what conditions and terms these tracks running off the right of way of the railroad company into these places of business are constructed?

A. Yes, sir.

Q. They are usually constructed under some agreement, are they not?

A. Yes, sir.

Q. By which the party who wants the track furnishes the right of way?

A. As a rule the party wanting the siding, I think, furnishes the right of way; but there are exceptions.

Q. Isn't it the general understanding that the published tariff rate includes the delivery on and from these business tracks?

A. On one's own road; yes, sir.

Q. That is the general understanding?

A. Yes, sir. I would like my answer to show that I mean on siding, not on belt lines.

71 Q. Does it not deliver on any track reached by the company transporting the property?

A. As far as my experience goes, yes, sir—that is, for carload freight.

Q. As a rule it is only carload freight that is received from, or is delivered upon, these business tracks?

A. As a rule.

Q. This switching charge that you have spoken of, which is made by one company for switching cars delivered to it by another, is made without reference to the question of competition or of competitive business, isn't it?

A. Oh, yes.

Q It is service performed by one company for another?

A. It is a service performed by one company for another for which they make a charge.

Q. Sometimes that charge is made very low between certain companies, because in the end it will come out about even, won't it? I mean for the period of a year, say?

A. Yes, sir. More often they are probably on a uniform basis. There are exceptions, of course, to that. For instance, I mentioned that the Michigan Central charged us a dollar more for the team track. That they imposed about two months ago.

Q. That is, your cars are shipped onto the ground owned by the Michigan Central, and are kept there for loading or unloading, as the case may be?

A. Yes, sir.

Q. In that case the charge is not only for the switching, but for furnishing terminal facilities?

A. Yes, sir.

Q. If the respondent company should build business tracks to reach business at Grand Rapids, there would be still a large amount of business that would not be reached by those tracks, would there not?

A. Yes, sir; inasmuch as Grand Rapids has a river running through the center of it.

Q. I know, but that would be so in any city, would it not? Take the Michigan Central at Detroit. It has a very large number of business tracks, but it has a large business which does not reach those tracks.

A. As you cite the Michigan Central, I should say that they got more business from their track than they do outside of their tracks in Detroit.

Q. How is it with the Detroit, Grand Haven & Milwaukee?

A. It would not be so with us, because we have not so many tracks; that is, in our business going out.

72 Q. But there is an immense business in Detroit that comes and goes in less than carload lots?

A. Yes, sir.

Q. That business is not done over these business or switch tracks, is it?

A. Not as a rule. It is in some instances.

Q. But at Grand Rapids you do not make any distinction with reference to cartage between the business that might be reached by these

business tracks, if you should build them, and business that would not be so reached, do you?

A. If we build these tracks and a man had a carload of freight, presumably that carload would go onto his siding, if he had one, while his next-door neighbor might have the same amount of freight, and if he didn't have a siding he would have to team it.

Q. That does not answer my question. You make no difference between business delivered in carloads and business that comes in less than carloads which is received at your first station?

A. Do you mean difference in rates?

Q. Difference in reference to free cartage.

A. We do not make any difference. We treat them all alike.

Q. You say that giving free cartage equalizes the difference as between competing companies?

A. Yes, sir.

Q. It does not equalize unless all the competing companies give free cartage, does it?

A. Yes, sir; it does in our case at Grand Rapids, for the reason that we are about a mile and a half out of the city and the other companies are in the center of it.

Q. Take this case. Here is a manufacturing establishment within 40 rods of the Michigan Central, but not upon a side track or business track—not on any track. If the Detroit & Milwaukee should give free cartage to that business, the Michigan Central would necessarily have to give free cartage in order to be upon an equality, would it not?

A. Yes, sir. On the other hand, the Michigan Central having a switch to a business place, the Detroit & Milwaukee would be out that much if they hadn't one.

Q. Certainly. It comes to this: If one competing company does free cartage where it becomes necessary, then all competing companies at that place must give free cartage?

A. Not necessarily.

Q. In order to be on an equality?

A. You take Grand Rapids, and several companies would get more business out of Grand Rapids with their sidings than they would without them.

73 Q. I am not speaking of siding. I am speaking of the business not reached by sidings at all. If one competing *competing* company gives free cartage to reach that business, then the other companies, although they may be nearer to it with their roads, must give free cartage, in order to be on an equality, must they not?

A. Yes.

Q. You have a station on your road called Ionia, have you not?

A. Yes, sir.

Q. How far is Ionia from Grand Rapids?

A. I think about 34 or 35 miles.

Q. Is the tariff the same from Ionia to the east as it is from Grand Rapids to the east? In other words, is it grouped with Grand Rapids?

A. Yes, sir.

Q. That is, for all business that comes or goes beyond Detroit?

A. No; I don't think that would apply in all cases beyond Detroit, but if you put it, as you say, beyond Buffalo, it would. I do not say that it is not, so far as Detroit is concerned, but the questions are getting too technical for me to recollect the details.

Q. How many stations are there on the Detroit, Grand Haven & Milwaukee road between Detroit and Grand Haven?

A. I would have to count them up to tell you. There are, perhaps, 25 to 30.

Q. Do you do free cartage anywhere except at Grand Rapids?

A. No.

Q. And Detroit?

A. We don't do it at Detroit.

Q. Who does do it?

A. The roads that run east.

Q. How does the Detroit, Grand Haven & Milwaukee get the business it receives for Detroit from Grand Rapids?

A. That is west business. We do not pay a cent of cartage in Detroit. The Lake Shore, the Michigan Central, the Grand Trunk all do cartage on their eastern business, not on the western.

Redirect. Mr. KIRCHNER:

Q. I understood you to say, in answer to a question of Mr. Pond's, categorically, that if you made a rebate of two cents a hundred on
74 all freight shipped from and received at Grand Rapids you would be substantially in the same position that you are in rendering the free-cartage service?

A. I corrected that.

Q. I did not so understand it.

A. I should have said that if we reduced our rates two cents per hundred pounds that it would only partially put us on an equality, inasmuch as we would lose the service we get now from our cartage agents for canvassing. We would also lose the guarantee we now have from them of their responsibility in collecting charges, etc.

Q. What proportion of the two cents per hundred that is paid is paid for the collection, the guaranteeing of freight charges, etc.?

A. I could not answer that now. I would have to figure it up.

Q. You say that freight in less than carload lots is not taken onto sidings and belt lines as a rule. Do you wish us to understand that not much of it is done as compared with the bulk of the freight received or shipped in carloads and that freight that is received and shipped in less than carloads?

A. What I mean is that in some instances freight in less than carloads is switched from manufactories to depots as a favor, but it is not the rule.

Q. It is not generally done?

A. It is not generally done. When I say it is done here, I believe that the Michigan Central does it largely in connection with their system of siding around the city.

Recross. Mr. POND:

Q. You express that as a belief?

A. I could not tell you, perhaps, the ground of my belief, but I am satisfied that they do it.

Q. You say the agreement with Hendrie & Co. is not in writing. Are you able to say with certainty that two cents per hundred is what you conclude you are paying?

A. I could not say that now, because I do not pass the accounts.

Q. I thought you said you had a memorandum of what the agreement was?

A. I have at the office, but not in my mind.

CHARLES J. HAIGH, a witness produced on behalf of the respondent, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

75 Examined by Mr. KIRCHNER:

Q. You live in Detroit?

A. Yes, sir.

Q. What is your business?

A. I am through traffic agent for the Grand Trunk Railway Company of Canada at Detroit.

Q. How long have you been such agent?

A. Since the 1st of January, 1891.

Q. How long have you been connected with that railway?

A. 32 years.

Q. Have you been for all that time in the service of the Grand Trunk Railway in your experience with railways?

A. No, sir; I have been for 32 years in the service of the Grand Trunk.

Q. And the rest of the time?

A. I was in the old country.

Q. With the Midland Road of England?

A. No, sir; with the London & Northwestern.

Q. Please state what has been the practice throughout the United States of railway companies as to doing free cartage as a means of securing traffic at stations on their respective lines of railway?

A. The custom has been to practice it in Cleveland, Detroit, and Jackson, I believe; as to other points I can not say anything about it.

Q. How long have you known that practice to exist?

A. At Detroit for about 13 years.

Q. What circumstances and conditions determine whether free cartage shall be practiced at any railway station?

A. Terminals and private sidings of a competitor.

Q. What do you mean by terminals? Do you mean the terminal facilities?

A. Yes, sir; the terminal facilities.

Q. By sidings you mean what?

A. Sidings to private manufacturers.

Q. Do you know whether it has been the practice of railway companies throughout the country to run their cars free of charge over sidings or belt lines to the stores or warehouses of shippers or consignees for the purpose of receiving and delivering freight free of charge for such service?

A. Yes, sir.

Q. How long have you known such practice to exist?

A. About eight years.

Q. Whether cotemporaneously with such practice it has also been the practice of some railway companies to make a switching charge against all railway companies for running cars on such siding or belt lines
76 to the stores or warehouses of shippers or consignees for the purpose of receiving and delivering freight?

A. Yes, sir.

Q. By whom are such switch charges primarily paid?

A. By the railroad carrying the freight.

Cross-examination. Mr. Pond:

Q. How long have you been stationed in Detroit in connection with the railway business?

A. Eight years.

Q. In what capacity?

A. Since January of last year as through traffic agent, and previous to that time as chief clerk in the general freight department.

Q. Of the Grand Trunk Railway of Canada?

A. Of the Grand Trunk Railway of Canada; yes, sir.

Q. You say whether or not free cartage shall be done depends upon the fact of whether the terminal facilities of the road that proposes to do it are as good as the terminal facilities of its competitors?

A. Yes, sir.

Q. If one company should give free cartage and its competitors should not, the terminal facilities of the company giving the free cartage would be better than those of the road not giving it, would they not?

A. Yes, sir.

Q. Without reference to the station?

A. Yes, sir.

Q. The Grand Trunk Railway of Canada gives free cartage into Detroit, does it not?

A. Yes, sir.

Q. Where is its warehouse?

A. On Beaubien street.

Q. How far from the corner of Jefferson and Woodward avenues?

A. To the best of my knowledge, I think it is about four squares—three or four.

Q. Is not that freight warehouse as accessible to the business generally of the city as the freight house of any competing road?

A. No; not as much so as the Michigan Central. I should hardly think it was.

Q. How far away is the Michigan Central's freight house, its general freight house, from the corner of Jefferson and Woodward avenues?

A. About the same distance; within a block or so.

Q. The Grand Trunk's freight house is to the east of Wood-
77 ward avenue and the Michigan Central's to the west?

A. Yes, sir.

Q. Is not the business that goes or comes over the railroads to Detroit as great east of Woodward avenue as west of Woodward avenue?

A. No; not to my knowledge. There are all those wholesale houses on Atwater street and on Jefferson avenue to the west of it. There are very few wholesale houses east of Woodward avenue.

Q. There is very little difference?

A. Oh, yes. There are quite a number more on the west side.

Q. What percentage of difference do you think there is of business between the freight warehouses of the Grand Trunk of Canada and the general freight warehouses of the Michigan Central?

A. I don't know. I couldn't say that now.

Q. The only places where free cartage is given, as far as you know, are Detroit, Cleveland, and Jackson?

A. That is all—well, Grand Rapids, I think, is included.

JAMES HUNTER, recalled on behalf of the respondent.

Examined by Mr. KIRCHNER:

Q. What has been the practice of railroad companies throughout the United States as to running their cars free of charge over sidings or belt lines to the stores or warehouses of shippers or consignees for the purpose of receiving or delivering freight free of charge for such service?

A. That seems to have been the practice. It has always been done ever since I have known anything about it.

Q. How long is that?

A. For the past 29 years.

Q. What circumstances and conditions determine the question of whether free cartage shall be practiced at any railway station?

A. The circumstances and conditions are not the same at all places, at all stations.

Q. What determines the practice, if you know?

A. It is practiced and it is determined where there is competition on sidings and belt lines and such like, similar to what exists at Lansing.

Q. Do you know whether the Michigan Central and Lake Shore have sidings and belt lines at Lansing and Jackson?

A. The Lake Shore has, I believe.

Q. The Lake Shore has where?

A. It has a belt line at Lansing.

Q. Does it do the switching service gratis?

78 A. Yes, sir.

Q. To people on that line?

A. Yes, sir.

Q. It has a long siding there, has it not?

A. Yes, sir.

Q. Which runs straight through the city?

A. Yes, sir.

Q. How is it at Jackson?

A. I don't know of any belt line at Jackson; there is a good deal of switching done there.

Q. How about Battle Creek?

A. Battle Creek is about similar to Jackson. The Michigan Central, being an old road, has nearly all the sidings and switches.

Q. State whether cotemporaneously with such practice it has been the practice of some railroad companies to make switching charges against all railroad companies for running their cars onto sidings or belt lines to stores or warehouses of shippers or consignees for the purpose of receiving and delivering freight.

A. Yes, sir; that is the practice. As far as I understand, the Michigan Central charged the Grand Trunk six dollars per car for switching all their cars—that is, the Grand Trunk proper, not the D., G. H. & M.

Q. How much do they charge the consignees or shippers for this same service when they have themselves done the business?

A. Nothing, sir.

Q. Who pays such switching charges when one is made; the railway company or the shipper or consignee?

A. The railroad company in all cases, as far as I have come in contact with it.

Q. Are you familiar with the respondent's railroad at Grand Rapids or its station?

A. No, sir; I am only familiar where I have agents in charge.

Cross-examination. Mr. POND:

Q. You say that one railroad company charges a competitor for switching to and from places of business?

A. Yes, sir.

Q. A railroad company charges anybody, whether it is a competitor or not, if it does any switching business for it?

A. I believe so, but they have different charges.

Q. When they switch for a shipper or consignee they get some earnings out of the business, don't they?

A. I could not say anything about that.

79 Q. They get the rate for hauling the business, don't they?

A. Yes, sir.

Q. When you say that they switch free, you mean that they do not make any charge in addition to the tariff?

A. They make no charge in addition to the regular rate.

Q. One railroad company switching cars for another company, unless it charged the other company something, would not get anything for doing the business, would it, at all?

A. No, sir.

Q. What do you know about what you call the belt line at Lansing?

A. I don't know whether you would call it a belt line or not. I know it is a track separate from the main line, running clear through the city.

Q. It is a spur track running through the city?

A. Yes, sir; running to all factories.

Q. Was that built by the Lake Shore or by the Michigan Central?

A. It was built by the people of Lansing, I should say. I don't know whether it is owned by the Michigan Central or the Lake Shore.

Q. It was built by the people who owned places along it, wasn't it, as you understaad it?

A. As I understand it, it was.

Q. It is used by the Lake Shore and the Michigan Central under some agreement?

A. Yes, sir.

Redirect. Mr. KIRCHNER:

Q. In answer to Mr. Pond's question, you stated that where one railway company switched the cars of another it always made a charge, whether it was a competitor or not. Does it discriminate between a competitor and one who is not a competitor?

A. I believe they do, yes, sir; they charge one railroad six dollars, another two dollars, another three dollars, and so on.

Recross. Mr. POND:

Q. Let me ask you—I suppose if two railroad companies should switch for each other, and the amount of switching done in the course of the year was substantially the same, it would not make any difference whether any charge was made at all?

A. I couldn't say anything about that.

80 Q. What is the answer?

A. I could not answer that.

Q. Suppose the two companies do for each other an equal amount of business, would it make any difference what charge was made if it was equal?

A. Oh, I think the charge is made simply as prohibitive to others.

Q. The Detroit, Grand Haven & Milwaukee does more or less switching for the Michigan Central, does it not?

A. Yes, sir; it does some.

Q. And for the Lake Shore?

A. Yes, sir.

Q. And vice versa?

A. Yes, sir.

Q. The Grand Trunk of Canada does not do any switching for the Michigan Central, do they?

A. Yes, sir; lots of it.

Q. Where?

A. To the elevators.

Q. That work is not done by the Grand Trunk Railroad of Canada, is it? That is the Detroit, Grand Haven & Milwaukee?

A. Well, I can't say about that.

Q. It is the Detroit, Grand Haven & Milwaukee that does that switching, isn't it?

A. Yes, I guess it is.

Q. There is not much switching business done between the Michigan Central and the Detroit, Grand Haven & Milwaukee, and there is none between the Grand Trunk of Canada and the Michigan Central, is there?

A. I don't know about that.

Q. You know that the Grand Trunk of Canada does no switching on this side of the river, don't you?

A. Well, I don't know how that matter is between them. I know if a car comes from the East over the Grand Trunk into Detroit, and it has to be switched onto the Michigan Central track, they charge six dollars.

Q. To what point?

A. To any points they reach.

Q. Do you know that?

A. Yes, sir.

Q. I guess you don't.

A. I guess I do; and in return the Grand Trunk only charges two dollars.

Q. The Grand Trunk of Canada does not do any switching for the Michigan Central, does it?

A. You may as well take it one way as the other. If there is
81 any business going to or coming from Canada, it has to be switched by some one; you may call it the D. & M., the Grand Trunk, or whatever you please; I don't care what you call it; it is an extra charge.

It is hereby stipulated between the solicitors to the above-entitled cause that the reading of the depositions to the witnesses, and their signatures thereto, shall be waived, and that the same may be read on the trial and argument of the cause with the same force and effect as though the same had been read over to them and signed.

The further hearing of the case was then adjourned to ten o'clock in the forenoon, February 23d, 1892.

FEBRUARY 23, 1892—10 o'clock a. m.

At this time the parties met, pursuant to adjournment; Mr. L. G. Palmer and Mr. Ashley Pond appeared on behalf of the petitioner, and Mr. Otto Kirchner appearing on behalf of the respondent, and the case was proceeded with as follows:

SAMUEL R. CALLAWAY, a witness produced on behalf of the respondent, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. You live in Toledo?

A. Yes, sir.

Q. What is your business there?

A. I am president of the Toledo, St. Louis & Kansas City Railway Company.

Q. How long have you been such?

A. About four years.

Q. And prior to that what was your business?

A. I have been connected with railroads since 1862.

Q. But immediately prior to your presidency of the road you are now connected with, what were you?

A. I was second vice-president and general manager of the Union Pacific R. R.

Q. How long were you general manager of the Union Pacific?

A. Three years.

Q. Prior to that were you general manager of the Chicago & Grand Trunk?

A. I was general manager of the Chicago & Grand Trunk and president of the Chicago & Western Indiana Railway Co. for three years prior to that. I was also connected with the Detroit, Grand Haven & Milwaukee.

Q. You were also general manager of that road?

A. I was superintendent of the Detroit, Grand Haven & Milwaukee for two or three years.

82 Q. Will you explain what is known as team tracks, and the delivery on what were known as team tracks?

A. Team tracks, or tracks usually set aside at railway stations outside of the general business or such business as is not consigned to special sidings.

Q. In carload lots, or how?

A. In car lots; usually in car lots, not always.

Q. And the consignee goes to the car on this team track and unloads this stuff and carts it away, is that it?

A. Yes, sir.

Q. In what respect does that differ from the practice of delivery on spur tracks or sidings?

A. In what respect?

Q. In any respect.

A. Generally in these cases trams are used where the delivery is upon team track, and where the delivery is upon a special siding the goods are delivered directly from the siding to the warehouse.

Q. How is freight in carload lots usually delivered or received by the shipper or consignee?

A. That depends entirely upon the locality.

Q. The point I want to get at is this——

A. (Interrupting.) For instance, at East St. Louis we pass most of the carload freights through the warehouse, in order to release the cars, and the teams come after it when they get ready; whereas, at smaller stations the car is usually put on the team track and the freight is delivered directly from the car.

Q. The point to which I desire to direct your attention is whether the goods are handled into and out of the car by the consignee and shipper both, whether received or delivered on team tracks or sidings?

A. That is usually the case at the smaller stations. Of course there are exceptions, as I have specified.

Q. Which you have specified?

A. Taking the case of East St. Louis, for example. The same thing exists at Detroit.

Q. Do you know of the practice of free delivery on lighterage?

A. In New York and Philadelphia?

Q. Yes.

A. Yes.

Q. Please explain what that system is.

A. Certain commodities deliver to certain warehouses and boats in New York is delivered free of charge, and a charge of three cents is made against the connecting lines, running as far back as the Mississippi River; in other words, it is deducted before prorating the rate.

83 If they rate from St. Louis at twenty-nine cents, three cents is deducted before prorating the total through charges, and this three cents is applied to the expense of delivery at New York, Philadelphia, and other tide-water ports.

Q. Are you familiar with the respondent's road and station at Grand Rapids?

A. Yes, sir.

Q. How long have you been?

A. Since 1874.

Q. Do you know what has been the practice at Grand Rapids as to free cartage service in connection with the respondent's road?

A. Only from common reports since my connection with the road, which was terminated in 1878.

Q. When you were connected with the road did you know what it was?

A. Yes, sir. We delivered free to certain establishments.

Q. Didn't you deliver free to everybody in Grand Rapids?

A. I can not testify as to that. My recollection is that it was confined then to special establishments, but I can not testify as to all.

Q. Do you know that free lighterage service is performed in Philadelphia?

A. I am not personally familiar with the lighterage service at Philadelphia.

Cross-examination. Mr. POND:

Q. This is the general understanding, is it not, that a tariff rate covers the delivery by these lighters that you speak of in New York?

A. Yes, sir.

Q. Is it not also the general understanding that the tariff rate covers the delivery upon any tracks controlled by the delivering road or terminal road?

A. Yes, sir.

Q. On all business tracks reached by the delivering road?

A. Yes, sir.

Q. Is it not also the understanding that the tariff covers the putting of the cars onto these business tracks for loading?

A. At what points?

Q. At all points where there are business tracks.

Q. Are you speaking of tide-water tracks?

A. No; generally.

Q. That the tariff covers the expense of loading?

A. No; I am speaking of the practice of putting cars onto these business tracks.

Q. For the purpose of being loaded?

84 A. Yes, sir.

Q. Where these business tracks exist the shipper loads the traffic that would, if it were brought to the warehouse, be loaded by the railroad company, would it not?

A. Yes, sir.

Q. So the consignee unloads the traffic that the railroad company would unload if it passed through the warehouse?

A. Yes, sir.

Q. The traffic received and delivered on these business tracks is, as a rule, in carload lots, is it not?

A. On these team tracks?

Q. No; on these business tracks reaching places or establishments?

A. Usually so; yes, sir.

Q. Do consignors load in carload lots on team tracks?

A. Usually; yes, sir.

Redirect. Mr. KIRCHNER:

Q. Do you know how generally the practice prevails of delivering on spur tracks?

A. It is very general.

Q. Throughout the country?

A. Yes, sir.

Q. Free?
A. Yes, sir.

Recross:

Q. When you say "free," you mean that the tariff rates cover such delivery and reception?
A. Yes, sir.

Redirect. Mr. KIRCHNER:

Q. Is the tariff rate greater in cases where the delivery is made upon the spur tracks than in cases where it is delivered on team tracks?
A. That depends entirely upon the conditions; at some points the switching charge is added to the rate.
Q. What condition determines that?
A. The general law of competition.
Q. A switching charge is made where the goods have been carried by a competing line?
A. Yes, sir.
Q. And no additional charge is made when it is carried by the carrier himself?
A. No, sir.
85 Q. And in that case there is no difference between the rate for delivery on team tracks and the rate for delivery upon side tracks?
A. That would depend upon the arrangement between the railroad company that did the business and its connection. The general custom to-day is to make a better general switching arrangements at all large places; for instance, at Marion, on our line——
Q. (Interrupting.) I am not asking you to state the universal practice I ask you to state whether it is the practice to deliver upon side tracks or spur tracks or sidings free of any charge by railway companies.
A. On its own side tracks; yes, sir; where it receives compensation for hauling the freight. Where it receives no compensation for hauling freight it generally makes a charge to its connection.
Q. When you speak of its own side tracks, do you refer to tracks having a connection with anything besides?
A. Yes.
Q. In such cases is there a difference in the rate between cases where the delivery is made upon side tracks or spur tracks or sidings and in cases where the delivery is made on so-called team tracks?
A. There is a variation in the open rate. Whether the switch charge is absorbed by the railroad doing the business——
Q. (Interrupting.) I say where the switching charge is absorbed by the railway doing the business is there a difference in the rate?
A. There is a difference of the switching rate. If the switching rate is 85——
Q. (Interrupting.) You do not understand my question or I don't make myself clear. I understand you to say that railway companies, when they have hauled the freight themselves or intend to haul it, receive the freight or deliver the freight upon sidings, side tracks, or spur tracks free of charge?
A. Yes, sir.

Q. In that case is the rate the same as it is where they receive or deliver the freight at team tracks?

A. Yes, sir.

Recross. Mr. POND:

Q. It does not make any difference whether the traffic is competitive or not, does it. A railroad company not participating in the transporting charges it onto the road for which it does the switching?

A. Yes.

86 Q. Isn't it true that a large amount of the traffic which is received and delivered on these business tracks is of a kind that would be loaded and unloaded by the railroad company if it passed through the warehouse?

A. Yes, sir; if it passed through the warehouse.

Q. Even though it could be transported in carload lots?

A. Yes, sir.

Q. So that a railroad company that can receive or deliver on those business tracks saves the expense of loading and unloading?

A. At a great many places; yes.

Q. Wherever the business tracks exist that they can use; their own business tracks, I mean?

A. That would not necessarily imply they did the loading and unloading themselves. At the larger stations they generally pass it through the warehouses, in which case they do it themselves. At the smaller stations the car would be put on the team track.

Q. There is a large amount of traffic, isn't there, that is transported in carload lots at the carload rate which ordinarily passes through the warehouse and is loaded and unloaded by the carrier?

A. Yes, sir; there is a large amount of traffic.

Q. There is a large amount of that same kind of traffic that is received and delivered on these business tracks?

A. Yes, sir.

Q. Then it is loaded by the consignor and unloaded by the consignee?

A. Yes, sir.

Q. Merchandise is not usually delivered except through the warehouse, is it?

A. At the larger stations it is generally put through the warehouse. At a great many of the smaller stations when they receive it in carload lots it is delivered on team tracks.

Q. But it is very seldom that merchandise is delivered in carload lots on business tracks, isn't it? Is it ever delivered?

A. Oh, yes; very frequently.

Q. Merchandise?

A. Yes. For instance, we load at all our principal stations cars for delivery that are put on team tracks.

Q. No; I don't speak of team tracks. I said tracks leading to the place of the shipper or consignee.

A. That depends on the amount of business they do.

Q. I speak of merchandise proper. It is very seldom that a merchandise track reaches the place where the merchandise is handled, is it not?

87 A. That depends upon what you claim as merchandise. There are a number of concerns in New York, Chicago, and other places that have their own side tracks.

Q. And handle business at their own warehouses?

A. Yes, sir; but usually merchandise is handled through warehouses.

RICHARD DOWLE, a witness produced on behalf of the respondent, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. You live in Detroit?

A. Yes, sir.

Q. What is your business?

A. I am manager of the Great Eastern Fast Freight Line.

Q. Will you tell us what that is—the Great Eastern Fast Freight Line?

A. It is a sort of a cooperative organization for the economical maintenance of offices in different cities for canvassing freight, etc.

Q. What is the ultimate object of that line?

A. To canvass for freight; get all the business we can.

Q. I ask you what is the ultimate object of that line?

A. To get all the money we can.

Q. What do you do to get your money? What is the occasion for all these offices?

A. To canvass for freight in different cities.

Q. For what purpose?

A. For transportation.

Q. For the transportation of what?

A. For the transportation of merchandise—freight.

Q. From what places to what places?

A. From different points on the continent.

Q. To where?

A. To and from different points—Chicago, New York, Boston, Philadelphia.

Q. What railroads are connected with this fast freight line?

A. The Delaware, Lackawanna & Western; the Grand Trunk; the Chicago & Grand Trunk; the Philadelphia & Reading; the Central Railroad of New Jersey; the Fitchburg Railroad; the Delaware & Hudson; the Detroit, Grand Haven & Milwaukee; the Detroit, Lansing & Northern; the Flint & Pere Marquette——

Q. (Interrupting.) And others?

A. And many others.

Q. Do you know whether there is any system of free delivery by lighters in the city of New York?

88 A. Yes, sir.

Q. How long has that system prevailed?

A. It prevailed before my time, sir. Upwards of twenty years, to my knowledge.

Q. Is that free-lighterage system of delivery open to all consignees in New York?

A. It is open to all shippers and consignees, I presume.

Q. To all of them?

A. All that desire to take advantage of it. It is open for them; yes, sir.

Q. And is a charge made for delivery outside of the lighterage district?

A. An extra charge is made.

Q. What do you know as to the free delivery of freight at sidings in Philadelphia?

A. The switching is extensively done there to railroads and private sidings.

Q. Is it done free of charge to the consignee?

A. That is my understanding.

Q. Then the people who are not fortunate enough to have their places of business on sidings have to pay for cartage in order to haul their stuff?

A. Not entirely so.

Q. To what extent is it so?

A. They have the privilege, if they can make the arrangement with the owners of the siding, to have their property switched there.

Q. They have to haul it from the switching place to their places of business, don't they?

A. Yes, sir.

Cross-examination. Mr. Pond:

Q. You speak of the free delivery by lighterage in New York.

A. Yes, sir.

Q. Is it a fact that delivery is considered to be paid for by the tariff?

A. Yes.

George Jerome, a witness produced on behalf of the respondent, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. Kirchner:

Q. You live in Detroit and are an attorney and counselior at law?

A. Yes, sir.

89 Q. You have been an attorney of the Detroit, Grand Haven & Milwaukee Railway Company?

A. Yes, sir.

Q. And you were for its predecessors for a great many years?

A. Since 1859 until a year ago.

Q. Do you remember when the station at Grand Rapids on the line of that railway was selected?

A. It was located a year before I came there, but there has not been much done. The site was fixed upon in 1858.

Q. Where, with respect to the city of Grand Rapids, as it then was, was it located to the business of the city of Grand Haven?

A. There was not very much of a city at Grand Rapids at that time. The store portion of Grand Rapids was up between that station and where Sweet's Hotel now is. I don't know as you know the locality, but the general business that came to the station was supposed to be nearer that station than it has since turned out to be.

Q. Whether in the development and growth of the city the business portion has grown away from the station as thus located?

A. Oh, yes; it has, largely. The business portion, you speak of?

Q. Yes.

A. Oh, yes, it has; it has spread further down the river.

Q. Up the river, you mean?

A. No, down. We are higher up the river than the business is. There is a good deal of business up the river, but the business that has spread, has spread down the river by Sweet's Hotel and in that low place, and where the Morton House is. I would like to make an explanation of the reason for locating the station there.

Q. Very well, explain it.

A. Some time after it was located there Mr. Brydges, the president of the road, came here, and we went out there and we found a little fault about the station. I did not have anything to do with the locating of the station. They said that the reason for putting it there was that it was the best place for getting business out of Grand Rapids. I got the title to the station grounds after I took charge.

GEORGE BECK, a witness produced on behalf of the respondent, being duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Examined by Mr. KIRCHNER:

Q. You reside in Detroit?

A. I do.

90 Q. How long have you lived here?

A. 15 years.

Q. What is your business?

A. I carry on milling. I carry on flour milling.

Q. Have you a partner in that firm?

A. Yes, sir.

Q. What is the name of the firm?

A. Jacob Beck & Sons.

Q. Are you one of the sons?

A. Yes.

Q. Where is the mill located?

A. Between Fourth and Fifth, on Congress street, on the south side.

Q. In what city?

A. Detroit.

Q. How long has it been located there?

A. I think twelve years, it might be thirteen; I don't know. Twelve years certainly.

Q. How much of a plant have you there?

A. Do you mean the value of it?

Q. Yes, sir.

A. Between $75,000 and $80,000.

Q. What is the output or the value of it?

A. Do you mean of the whole output?

Q. Yes.

A. Do you want to know how much business we do in a year?

Q. Anyway; I want to know the value of the output.

A. $247,000 last year.

Q. Have you any spur tracks or sidings?

A. Nothing at all.

Q. Are you on a belt line?

A. No.

Q. Are you so situated that a siding or spur track could be built?

A. I don't think so.

Q. How do you receive your consignments from railway stations and how do you convey them to the railway stations?

A. We receive them by our own teams, hauling it from the different elevators and from the different cars from the different tracks. That is how we bring it in.

Q. Yes.

A. And in sending them out the different railroads call for our stuff, all that is going east. In fact all our output does go east, and the railroads call for that free of charge.

Q. That is, they cart it?

91 Q. They cart it free of charge?

A. Yes, sir; they cart it free of charge to competing points, and all our points, I believe, are competing points, or nearly all so.

Q. What railroads do that?

A. The Michigan Central, the C. P. R. R., the Grand Trunk. I think that is about all that take the stuff east.

Q. Suppose this free cartage service was not rendered here in Detroit to you, what would be the consequence to your business?

A. The upshot of it would be that we would have to haul it ourselves to the different depots at a pretty large expense.

Q. How much a year do you suppose it would amount to?

A. I should think it would be pretty well onto three thousand dollars. I think it would amount to that. That I would not say positively.

Q. Could you compete with your competitors here and elsewhere that are grouped in the same freight schedule with you?

A. The people we are competing against are Woodard & Crofoot, of Chicago, who have sidings into their mill, and the Akron Milling Company, of Akron, Ohio, who also have tracks right into their mills. Those are our principal competitors in our line. I believe Stott is now building a mill on the railroad track to manufacture a similar class of goods. Of course he will be a competitor, and will have that advantage over us if we have to do our carting.

Q. Could you successfully compete with them if you had to do this cartage?

A. I doubt very much if we could. It would take the profit off us. The competition is very close in our trade in the east; very close with our trade.

Q. Are there any competitors in Detroit?

A. No; I believe not, excepting that Henkel is now putting in a plant for the same purpose, and the Commercial Milling Company are putting in a plant.

Cross-examination. Mr. Pond:

Q. You say your shipments are all to competing points?

A. Nearly all.

Q. What do you mean by competing points?

A. Boston——

Q. (Interrupting.) Do you mean points reached by railroads that reach Detroit; points in the East reached by railroads which take your business in Detroit?

A. I believe it is mostly taken to the bridge, and it is there
92 distributed to the different roads. I could not tell you the points that they take cartage free for, but to nearly all of them. Boston, Portland, New York, Philadelphia, and Baltimore, I think.

Q. Can you name so-called noncompeting points?

A. We do ship to some, but not much.

Q. What are the points?

A. There are some Ohio points; for instance, Cleveland. We do our own hauling to the Michigan Central for Cleveland, because they do not call for that point.

Q. The roads like the Grand Trunk, running from here east, do not reach Cleveland?

A. They do not reach Cleveland.

Q. Land is worth a little more where it is situated near the tracks of a railroad, so that side tracks can be run into it, isn't it, than land situated elsewhere?

A. I don't know. I never tried to buy any land or to look for any land outside of what we have. Our plant was put there when they were free cartage, and we supposed it would be continued, or else I doubt very much whether we would have put the plant there. We looked it over before we located it. I believe we make the largest output of any mill of the kind anywhere, almost.

Redirect. Mr. KIRCHNER:

Q. If free cartage were discontinued it would depreciate the value of your property very much?

A. It would depreciate our plant, certainly. It would make a difference to us and make us pay a rental of $3,000 a year, or very near it, anyway.

Recross. Mr. POND:

Q. What do you say you estimate the value of your plant to be?

A. Between $75,000 and $80,000.

Q. Including the land?

A. The land, building, and machinery.

Q. What amount of land have you?

A. 60 feet.

Q. On Congress?

A. Yes, sir; it is covered entirely with our building.

Q. What do you call the land worth?

A. When we bought it five years ago we paid in the neighborhood of five thousand dollars for the land, something over, perhaps, without any building. There was a little low building on it.

93 Q. And do you consider that the value of your land now?

A. In our stock it has been carried right along at the amount which we paid for it.

It is hereby stipulated between the counsel for the respective parties hereto that the reading of the foregoing depositions to the witnesses and the signing of the same shall be waived, and that the depositions as

returned by the commissioner may be used upon the trial and argument of the cause with the same force and effect as though the same had been duly read over to the witnesses and signed by them.

(Endorsed:) No. 1059. U. S. circuit court, W. D. Mich., So. Divn. In equity. Interstate Commerce Commission vs. D., G. H. & M. Ry. Co. Copy of testimony and stipulation. Filed Aug. 21, 1894. Chas. L. Fitch, clerk.

United States circuit court, western district of Michigan.

THE INTERSTATE COMMERCE COMMISSION)
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY CO.)

TAFT, C. J.:

This was a bill in equity exhibited by the Interstate Commerce Commission averring that the Detroit, Grand Haven & Milwaukee Railway Company, a common carrier corporation subject to the provisions of the interstate-commerce law, had been duly impleaded in a controversy before the Interstate Commerce Commission upon the petition of Mary O. Stone and Thomas Carten, residing at the city of Ionia, Michigan, wherein it was made to appear to the satisfaction of the Commission that the said defendant had violated the provisions of the interstate-commerce law as alleged; that the Commission had formulated an order and notice in relation to the matters charged in the petition, based upon findings and determinations of the Commission with respect thereto, which order was still in force, but which the defendant refused to obey. Wherefore the Commission prayed for an injunction, mandatory or otherwise, to restrain the defendant, its officers, servants, and attorneys, from further continuing in their violations of and disobedience to the order of the Commission.

The facts found by the Commission were as follows:

1. The complainants are copartners doing business under the firm name of Stone & Carten, and are engaged in the sale at retail of goods, wares, and merchandise in the city of Ionia, county of Ionia and State of Michigan, purchasing said goods, wares, and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Michigan.

94 2. That the respondent railway company is a corporation existing under and pursuant to the laws of the State of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railway being in the State of Michigan; but it does not own and control a line of steamboats, plying across Lake Michigan, between Grand Haven and Milwaukee, Wisconsin, but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan, between Grand Haven and Milwaukee, from which the respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee; that all of said boats are under the direction and control of an independent corporation, organized under the laws of the State of Michigan, by the name of the

Grand Haven & Milwaukee Transportation Company; that the management of the business of the last-named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

3. The respondent, for its services as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights, which makes on all freights from Philadelphia, New York, and Boston and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which is made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids, a copy of which schedule or tariff is hereto annexed and deemed a part hereof.

4. The shipments of freight from Philadelphia, New York, Boston, and points east of Detroit, which are delivered to complainant's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line in the same direction, the shorter being included in the longer distance.

5. That the respondent provides, at its own expense, drays, carts, and trucks at the city of Grand Rapids for the service of transporting merchandise and freights generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston, and points east of Detroit, between its station at Grand Rapids and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complain-
95 ants or other merchants, traders, and patrons of its road at the city of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is on an average one and a quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business center of said city; that at the city of Grand Rapids there are two other railroads, the Michigan Central Railroad and the Grand Rapids, Lansing & Detroit Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short haul to and from their stations, on an average about one-quarter of a mile; that the respondent did the carting of freight to and from its station at Grand Rapids, substantially in the same manner as at present, long prior to the time when either said Michigan Central or Grand Rapids, Lansing & Detroit railroads were constructed to that place.

6. That the actual cost of carting or draying freight from the respondent's warehouse in the city of Ionia to the several places in said city

of Ionia to and from which traffic has to be hauled is two cents per hundredweight; that the cost of carting or draying freight transported over respondent's line to and from places of business of the merchants, traders, and other patrons of its road at Grand Rapids is two cents per hundredweight.

7. That there is but slight competition encountered by the complainants and other persons, firms, and corporations engaged in business at the city of Ionia, interested in shipping over respondent's road, with similar business at the city of Grand Rapids.

9. The complainants have not brought any suit for the recovery of money or damages for which the respondent is alleged to be liable under the provisions of the act to regulate commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

10. The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6,000. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 982,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.

96 11. Cartage by railway companies in a similar manner to that at Grand Rapids is conducted by other railway companies at exceptional stations in the State of Michigan, and more or less extensively practiced by companies in other States at exceptional stations.

On this statement of facts a majority of the Commission, the chairman, Judge Cooley, and Commissioners Morrison and Schoonmaker, held that the cartage at Grand Rapids was a violation of the long and short haul clause of the 4th section of the act to regulate commerce, because its result was that the merchants at Grand Rapids obtained transportation of freight from Boston, New York, and Philadelphia at two cents a hundred less than the merchants of Ionia, the free cartage at Grand Rapids being in effect a payment in money's worth to the merchants at Grand Rapids of two cents a hundred. Commissioners Morrison and Schoonmaker also held that the free cartage was unlawful on the further ground that it was in effect a device for receiving less than the established tariff rate from and to that point, that it was a rebate in violation of the second section of the act.

The answer of the defendant to the bill herein admitted the averment of the findings of fact embodied in the opinion of the Interstate Commerce Commission, and averred that it had been the practice of railway companies engaged in interstate commerce to do free cartage as a means of obtaining traffic at exceptional stations on the lines of the railroads where the business was of sufficient magnitude to warrant the carrier in incurring the expense, and that such expense was deemed to be legitimate as a means of securing traffic for the railroad and of affording increased facilities and dispatch for doing its business; that on every railroad in Michigan and in the United States there were tracks constructed by the railway company, at its own expense, at exceptional stations on the line of road, leading from the main track of the road to private business establishments, which were used solely for delivering and receiving freight in the business between such private business establishments and the railway and without any charge being made by

the railway company therefor; though there were private business establishments at the same station of the railroad, not furnished with these advantages in connection with such traffic; that such practice did not infringe any provision of the interstate-commerce law, and yet it involved quite as clear an element of discrimination as the cartage system at Grand Rapids; that the practice of freight cartage was originally adopted because it was less expensive than would be a change of its line so as to bring it into nearer proximity to the business center of the city or the construction and operation of spur tracks from the main line of road into the business center where the main-line tracks of
97 its competitors, the Michigan Central and the Detroit, Lansing & Northern Railroad companies, were held in said city; that the free cartage had the additional advantage of enabling the carrier to promptly clear the freight buildings of traffic and prevent its burdensome and expensive accumulation, and that it secured a method and order in the delivery of its traffic from its buildings, and that it also saved the expense of sending notice to the consignees of the arrival of freight; that the free cartage at Grand Rapids was an absolute condition of the respondent's procuring for its road any considerable part of the freight traffic of the city; that the two cents a hundred pounds paid for cartage at the city of Grand Rapids by respondent was not paid alone for its cartage, but included the services of the cartage agents, acting in behalf of respondent, in soliciting freight traffic for its road and collecting bills for freight charges; that the value of these services, aside from the mere matter of carting the freight, was not less than one-third the sum which respondent paid.

Wherefore the defendant submitted that in view of all these considerations, the free cartage was not an undue or unreasonable preference or advantage to said city of Grand Rapids as against the city of Ionia, and was not in conflict with the long and short haul clause of the law.

Taft, J. The first objection made by defendant to granting the relief asked is that the complainants before the Commission, Stone and Carten, had no real grievance, but were instigated to their prosecution by a competitor of the defendant, the Michigan Central Railway, which is paying the expenses of the litigation. This objection is not founded on any finding of the Commission, but on an admission of counsel for the complainant below before the Commission, and is referred to in the dissenting opinion of Mr. Commissioner Bragg. Were this a mere private action by private litigants, the objection, if founded on anything in the record (as this does not seem to be), might have weight, but under the provisions of the interstate-commerce law we are not permitted to entertain it. The act by section 13 provides for the lodging by any person of complaints with the Commission, of a common carrier's violations of the law, and expressly enjoins upon the Commission "that no complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Moreover, the same section provides that "said Commission ..... may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." By section 15 of the act the Commission is required, in any case where investigation has

been made by it, if the law has been violated, to notify the com-
98 mon carrier to cease from further violation, and by section 16, in case of the refusal of the common carrier to obey, it becomes the duty of the Commission to apply by petition to a circuit court in equity to enforce its order and restrain the further violation of law by the carrier. It is obvious from these provisions that when the case reaches the circuit court on petition of the Commission it is the complaint of the Commission which gives the court jurisdiction, and that the bona fides of the complaint can not be attacked by impeaching the good faith of those who, in the first instance, induced the Commission to take action.

Although the question was made in the original answer before the Commission, it is not seriously disputed here that the defendant is a common carrier subject to the provisions of the interstate-commerce law.

The question at issue is whether the practice of free cartage at Grand Rapids is, with reference to the shippers at Ionia, a violation of the following sections of the interstate-commerce law:

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, but this
99 shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: Provided, however, That upon application to the Commission, appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; that the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act."

It is conceded that the contract of carriage of a railway common carrier as usually understood is the transportation of the goods from the warehouse of the railway at the point of shipment to the railway warehouse at the point of destination. Generally the cartage from the railway warehouse to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee. Now, it is admitted that this latter would be a violation of the long and short haul clause if the reduction were made at Grand Rapids and not at Ionia. Why should not its exact equivalent, the furnishing of free cartage, be also a violation? It is said that it is not, because the transportation to Ionia and that to Grand Rapids are not under substantially similar circumstances and conditions. In accordance with a practice which has been approved by the Interstate Commerce Commission (Imperial Coal Company vs. The Pittsburgh & Lake Erie R. R., 2 I. S. C. C., 618), Ionia and Grand Rapids are grouped together by the defendant company as stations to which the freight rates from the far East—Boston, New York, and Philadelphia—may properly be made the same. This is a conclusive admission by the defendant that, so far as the transportation from the East to the warehouses of the company at the two places is concerned, it is under substantially similar circumstances and conditions. The question remains whether the conditions existing with reference to the delivery of goods from the warehouses to the storehouses of the consignees are such as to warrant a full charge for the same at Ionia and no charge at all at Grand Rapids. If not, then the free cartage at Grand Rapids is in fact a reduction in the cost of transportation to Grand Rapids and illegal. We do not see how this result can be escaped. The reasoning is said to be mathematical, but that is a term ordinarily not used to describe defective reasoning. Any benefit in relation to the shipment of goods having a definite money value conferred gratis by the shipper upon one shipper which is not conferred upon another when the service to each is admittedly under substantially similar circumstances and conditions, is an undue reduction in the price of carriage to the former and is illegal. If this were not true, then the provision against undue discrimination, of which the long and short haul inhibition is only one instance, would be a dead letter.

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It may be admitted that the terminal facilities may be varied at different stations without causing undue discrimination, provided such a variation is not such a departure from the usual facilities as to make it an obvious reduction in the cost of transportation to the shipper. It is very clear that free cartage is exceptional, and that it is a departure from the usual terminal facilities furnished either at large or small cities and towns. Of course it would not be a discrimination that could be complained of, that one company puts its station at one town nearer the business center than another, and if free cartage could be said to properly make up for the greater distance of defendant's station from the business center of Grand Rapids, and in this respect to put Grand Rapids merchants on the same footing as Ionia merchants with their proximity to the station, then it would seem to be unobjectionable because justified by

the dissimilar circumstances. But can this be said? We think not. If at Grand Rapids the defendant's station were moved into the business center, the shippers would still have to pay for the cartage. It may be that it would be for a less price, but still they would have to pay; the equalizing of the conditions between the two places in this respect would be complete by a charge for cartage by the railway company at the lower rate which would be charged for cartage were the station in the city. Free cartage from defendant's station at Grand Rapids confers on the shippers a benefit of a definite money value over *and* above that usually included in a transportation tariff, equal to the cost of cartage from a station in the center of the city.

What has been said with reference to the difference between the distance of the station at Grand Rapids from the business center and that of the station at Ionia has equal application to the contention of the defendant that the free cartage is justified by the fact that the competitors of the defendant have their stations at Grand Rapids in the business center, and that this places defendant at a disadvantage, which creates a dissimilar condition. Even if competition under such circumstances can produce dissimilarity of conditions, the extent of the discrimination founded thereon must be commensurate with and limited to the dissimilarity. It will fully equalize the conditions if the defendant furnishes cartage for a mile and a quarter at a price equal to that at
101 which cartage for a quarter of a mile could be furnished without loss. To do more is to bid for competition by reducing the cost of transportation, and this can not be done except by proportionately reducing the rates at Ionia also.

But it is said that Grand Rapids is a much larger place than Ionia, and therefore a carrier may confer favors on a shipper at the former place. In so far as the greater amount of business enables the railway company to do carting at a cheaper rate at Grand Rapids than at Ionia, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places, but cartage at Grand Rapids must cost something, and free cartage, therefore, confers on the shipper a benefit which dissimilarity of conditions does not justify.

The chief argument for the defendant is based on the custom among railroads to furnish those of their customers whose storehouses are convenient to the railway track with switch tracks, so that upon these tracks consignments in carloads are delivered at the door of the consignee. If free cartage is to be prohibited, it is said that the same principle must prevent the use of switch tracks for such a purpose, because this is a benefit to certain customers of a similar character not enjoyed by others. We do not think the cases are parallel. The providing of a switch track depends on two things; first, the proximity of the consignee's storehouse, and second, business of a character to require or permit consignments in carload lots. The first of these conditions, and perhaps the second, entitles the customer to a lawful discrimination in his favor. The favorable location of his storehouse with respect to the track is an advantage which he may rightly improve, and it may be that the wholesale character of his business is another element which may justify a discrimination in his favor over smaller shippers. (Interstate Commerce

Commission v. B. & O. R. R. Company, 146 U. S., 263.) If a case were presented where a merchant at Ionia, with his storehouse convenient to the track of the defendant, had been refused a switch track and delivery thereon of merchandise in carload lots, when such a benefit was conferred on merchants at Grand Rapids not differently situated, a question might then arise similar to that at the bar, but it is not presented by a discrimination between merchants with storehouses far from the railroad track, or who receive consignments of small bulk, and those who are near the track and receive carload lots. It would be a legitimate argument against a particular construction of the interstate-commerce law if its logical result were the prohibition of a practice so general as that
102 of private switch tracks, and which has always been considered lawful. But, as we have seen, the prohibition of free cartage does not involve any such result.

In order that a railway may reach many customers it sometimes builds a belt railroad. This is a mere extension of its track, and if the business to be obtained thereby will justify there is no more objection to it as undue discrimination than there would be to the building of a branch road or the delivery of goods from several warehouses. It is part of the railroad business and the means of delivery is by railroad. Cartage is not usual railroad business, but is something not usually undertaken by them. It is as foreign to ordinary freight business as it would be for the company to do the packing for shippers free of cost.

For the reasons given the prayer of the petition must be granted and a decree entered accordingly.

WM. H. TAFT, *Circuit Judge.*

MAY 13TH, 1893.

(Endorsed:) No. 1059. The circuit court of the United States for the western district of Michigan, southern division. In equity. Interstate Commerce Commission vs. Detroit, Grand Haven & Milwaukee R'y Co. Opinion of Taft, circuit judge. Filed Oct. 6, 1893. John McQuewan, deputy clerk.

Proceeding under the interstate-commerce act.

The circuit court of the United States for the western district of Michigan, southern division.

INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

SEVERENS, D. J. (dissenting):

The finding of the facts by the Commission is adopted for the purposes of this opinion, together with some further facts not inconsistent therewith proven by the testimony, or of which judicial notice is taken.

It is a legitimate rule in the construction of language, employed in statutes that attention should be given to results which will follow from a proposed interpretation, and if those results are contrary to the general purpose and object of the act and are plainly seen to be such as were not

intended, it should be rejected, unless the terms employed are too
103 rigid to bear some other interpretation in harmony with the general policy of the law. The object sought to be attained is the guiding light always, and in the construction of this statute, couched as it is in broad and general language, it should be kept constantly in sight. For reasons presently to be stated, it appears to me that the conclusions of the Commission and the order founded thereon are productive of results quite different from those intended.

The general purpose of the interstate-commerce act was to prevent the practice of extortion by common carriers in the transportation of freight and passengers between the States by the imposition of unjust and unreasonable rates.

This is well known as matter of history and the courts take judicial notice of it. The law was passed for the protection of the public, and not for the benefit or to redress any grievance of common carriers. They were known to be able to take care of themselves. And the closing paragraph of the first section sounds the keynote to the whole act when it says that "every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

And this suggests a question somewhat preliminary in its nature, concerning the purpose of the proceeding and the province and duty of the court in dealing with it, which appears to me to deserve consideration.

The act provides by the 13th section that any person, corporation, or association, or any body politic, may make complaint to the Commission for any violation by a common carrier of its provisions. Notice is thereupon required to be given by the Commission to the carrier of the charges preferred, and it is called upon to satisfy the complaint or give its reason for refusal. If the carrier makes reparation for the injury complained of, it is relieved from all liability to the complainant for the particular violation complained of. If this is not done, or if there shall be reasonable ground for investigating the subject of complaint, it is the duty of the Commission to investigate it. The Commission may also institute an inquiry upon its own motion in the same manner and to the same effect as though complaint had been made. In the latter case, it is clearly implied, as well from the language of the act as from the nature of the proceeding, that any order it may make as the result of its inquiry must be upon notice of the particular violation which is charged against the carrier. However the proceedings may be commenced the Commission is required by the 14th section, if it makes investigation, to make report of the facts found by it and its conclusions thereon and its recommendation in respect to the reparation which should be made to any injured party if there be such.

104 By the 15th section, if the Commission finds the charges to have been sustained, it is required to give a copy of its report to the carrier, together with a notice that it desist from the violation charged and make the reparation it has recommended to be made to any injured party. If the carrier complies with this notice it is thereupon relieved from any further liability or penalty for such particular violation of law.

Then, by the 16th section, provision is made for an appeal to the courts in case of noncompliance with the notice of its duty enjoined in respect of the matters charged against the carrier by the Commission. If that

refusal is in respect to a matter not triable by jury, the Commission or any party interested in the order or requirement it has made may apply to the circuit court in equity upon petition for such order or process, mandatory or otherwise, as shall be necessary and appropriate to compel obedience to the order of the Commission. And if upon due hearing, the court shall find that the carrier has been guilty of the matter charged and the order or requirement of the Commission was such as the law required in such case, it will enforce obedience accordingly.

It is to be observed that the whole scope of the duty thus imposed upon the court is the trial of the questions of fact and law involved in the inquiry as to whether the respondent was by the particular order of the Commission required to execute a duty enjoined upon common carriers by the statute in the circumstances as they are found by the court to have existed; and if that inquiry results in such a finding, then also in awarding the proper process for compulsion. The court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end.

In this case the record indicates that the complaint was made by parties residing at Ionia. After setting forth the facts upon which it was based, it summarizes the grounds thereof by alleging that the respondent was by its practice violating the second, third, and fourth sections of the act, and prays that the respondent should be ordered to discontinue free cartage of freight for the merchants of Grand Rapids, or to render like service to the merchants of Ionia, or for other appropriate relief. The Commission, after finding the facts and giving its reasons for its conclusion, held that it followed therefrom that the defendant was guilty of violating the long and short haul clause of the fourth section, and that consignees at Ionia were overcharged to the extent indicated. The complaint was sustained on that ground, and the Commission declared its purpose to order accordingly, without passing on the other points.

105 The inhibition of the long and short haul clause is against the charging "any greater compensation in the aggregate for the transportation of passengers or the like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance," etc.

The offense is made to consist in charging the greater compensation for the short distance, and this is what the Commission concluded the respondent had done. It would seem that the due order for the correction of such offending would be to require the carrier to desist from charging the merchants of Ionia the greater compensation and to fix a rate to correspond with its Grand Rapids rate, or accord some equivalent advantage to them, such as free cartage. Such correction would result in advancing the interests of the public at Ionia and in leaving the public at Grand Rapids in the enjoyment of the facilities which had been afforded them by a practice which the Commission rightly declared was perfectly lawful in itself.

The effect of such an order might be somewhat disadvantageous to the competing railroad there, which is also one of its competitors at Grand Rapids, but it would furnish no lawful ground of complaint to such competitor.

Instead of doing this the Commission made an order which raises the compensation which the public at Grand Rapids must pay for the service they have enjoyed, and the benefit of their loss does not come to any other portion of the general public, but falls into the hands of the competing railroads by crowding their rival out. It seems to me the Commission could not have sufficiently considered the results of their order. If they did, I am at a loss to understand how they could reconcile it with the spirit and policy of the law.

If, as is claimed (and I think it must be conceded, properly), we can not look back of the proceedings of the Commission to inquire into the motive of the parties who set them in motion, we are yet bound to recognize the obvious consequences and give their consideration due weight in determining whether, as matter of law, the order we are asked to enforce was such as was warranted by the assumed facts. I can not but think that the express language of the long and short haul clause, the well-known general purpose of the act, and the argument drawn from results incongruous with that purpose, all concur to repel the approval of the order of the Commission upon the ground assumed by it in its opinion. However, if the facts as they are here found to exist are such as to have warranted the order, probably the conclusions of the Commission as to matters of law are not material.

106 But I am also of the opinion that there was nothing in the facts which justified the conclusion that any provision of the statute had been violated.

Having in the closing paragraph of the first section indicated the general purpose, the act proceeds, in sections 2, 3, 4, and 5, to lay down certain rules by which that object is to be attained.

By the 2d section it prohibits all kinds of discrimination in the imposition of charges upon different persons for the like service rendered under similar conditions.

By the 3d it prohibits all undue preference by the carrier to any person or locality or kind of traffic, or the subjecting of any person or locality to any undue or unreasonable disadvantage, and then proceeds to require the carrier to afford reasonable and equal facilities to connecting lines for the interchange of traffic, without discrimination of rates between such connecting lines.

The fourth section prohibits the charging a greater rate for transportation, under similar conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

The fifth prohibits the pooling of freights between competing carriers.

Subsequent sections contain subordinate regulations designed to facilitate the operation of the provisions of the sections above enumerated, especially the second, third, and fourth.

What is there in these provisions which, justly interpreted, renders the respondent's course of business, otherwise lawful, obnoxious to the prohibitory order of the Commission? Surely there is nothing in it which contravenes their general purpose. But it is attempted by argument to show that this course of business is in conflict with some of the provisions which are designed to accomplish that purpose. The argument appears to me to rest upon unsubstantial grounds, which have been swept

away by the rulings of the Commission itself upon constructions of the law which have been acquiesced in as just and reasonable. When it was held that it was consistent with the spirit of the law for the common carrier to group stations which were 75 or 100 miles apart and charge a common rate to each, the strict construction of the act was abandoned for what was thought to be a more rational one. And when it was further conceded that, for reasons founded on public necessity or convenience, the carrier might carry freight beyond its terminal station and deliver it to its patrons along spur tracks and belt lines, another broad construction was adopted in the genuine spirit of the law. The differing conditions and circumstances in large cities and small villages are rightly held to justify it. The facts in the present case illustrate
107 this. The average distance from the station at Ionia to the merchants there is short, the place being small. The distance at Grand Rapids is five times as great and the business ten times as large. These differing circumstances and conditions are of a local character and do not pertain to the transportation by the carrier. If they are not in terms those mentioned in the statute, they are at least relied upon in construction as elements to be taken into account in determining what is a reasonable discrimination. With these concessions in view it is difficult to be very seriously impressed by the suggestion that one object of the law was to prevent the blighting effect upon smaller towns by the discrimination which had been given to larger ones, if by discrimination is meant the giving the facilities above mentioned. If that was an abuse the law has passed it by. But it was not an abuse. It is absurd to say that a common carrier is bound to supply every little hamlet the same advantages for the transmission and reception of freight that it does to large cities. The similar circumstances and conditions to which the statute refers are those which are found in the different localities to be served as well as those which pertain to the transportation. Whether the dissimilarity arises from one cause or the other, if it affects the service it is within the language and the reason of the statute.

It is found by the Commission that similar cartage is practiced by other common carriers at exceptional stations in Michigan, and is more or less extensively practiced by companies in other States at exceptional stations. By exceptional it is presumed to be understood that the conditions are similar to those at Grand Rapids, or otherwise the fact is irrelevant. Thus it happens that at one place where the public necessity or convenience requires it, it is met by the projection of branches and belt lines beyond the terminal station of transportation at that locality, and from them delivering freight to their customers, and at another by rendering substantially the same service by cartage, at another by lighterage, a "business in which railroads are not usually employed." The only difference is in the means employed by the carrier to accomplish the same end. But of what real significance is that? It is the service, the actual benefit given, which makes such discrimination as there is, and not the particular instrumentality by which it is effected. It is transportation, and that by a common carrier in the one case as much as the other. So far as the public are concerned, the particular way in which the thing is done is matter of indifference, and no possible reason is perceived why that may not be left to be determined by the economy of the carrier.

To say that it must be done on rails and by steam, instead of on wagons and by horsepower, is purely arbitrary. The law is levelled at
108 the carrier as such, and only at the railroad company in its character of a carrier. Conceding it to be permissible to build belt lines and spur tracks to reach many customers and thereby obtain more business, it is yet said that this is so because it is a part of railroad business, and the means of delivery is by railroad; that cartage is not usual railroad business; that it is as foreign to ordinary freight business as it would be to do the packing for shippers free of cost. This does not appear to me to state the situation correctly. Packing for the shippers is not only never done, but it is not transportation or delivery or reception of goods. The cartage of goods, though not usual, is sometimes resorted to as a substitute for delivery on rails, and is generally resorted to when it is the most convenient method in the circumstances. And the suggestion also appears to me to be at fault in assuming that the statute makes any distinction between carrying wholly by rail and partly by rail and partly by other means, with any purpose to make the latter, when equivalent to the former, unlawful. I can not think that any language in the act, or any postulate of reason, can be invoked upon which to say to the common carrier that the transportation which it may fairly do by the usual methods it employs it shall not do by any method not usually adopted, even though it is a perfectly lawful method for a common carrier and is more economical for it in the special circumstances and equally convenient to the public.

The rate schedules of the carrier, ordinarily, and probably almost universally, and the bills of lading issued thereon, in terms, contemplate the station of the carrier as the locality to which the freight is consigned as the terminus of transportation and the place of delivery. If we are to regard a service beyond that at one locality as per se a discrimination against a locality which does not receive it, it must be upon some principle, and if there be such a principle, it must be equally efficacious to defeat the discrimination, however produced. Calculation is made to show that it costs two cents per hundred to render the delivery service at Grand Rapids. How much it costs carriers to deliver freight by side tracks does not appear, but it must cost something, even if the track is laid for them, and of that the customer gets the benefit. It can make no difference in the principle how many get that benefit. Whether one or all, it is the same discrimination as to the public at Ionia.

It would be allowable, it is said, for the respondent to extend branches through the city, and accommodate the public by delivery to them on those lines. If the situation were so fortunate that all or the great majority could be thus accommodated, it would not make the practice more objectionable.

109 It is charged that the schedule rates are violated. What do those rates mean? In strictness, as already pointed out, they mean transportation from and to the stations named. In fact, they mean that, together with the terminal facilities which are afforded by the carrier. The contract of transportation is entered into with those in view. These incidental facilities furnished at the locality of the station, in one form or another, are enjoyed by the consignees of a very large proportion of the freight traffic of the country. There is no violation of the sched-

ule of rates in this practice, for the schedule is not in the general business of the public construed in so strict a way as the suggestion implies.

It is said that the defraying the expense of cartage delivery is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee, and that this latter would be a violation of the long and short haul clause if the reduction were made at Grand Rapids and not at Ionia. This argument proves too much, and can not be sound. It would overturn much wholesome doctrine which is already well settled. By the same reasoning any advantage of any value given by the terminal facilities of the carrier to customers at one place is exactly equivalent to a reduction to the same extent as that value from the freight charge to that place, and is an unlawful discrimination against others in that group. The fault in the argument is, I think, in assuming the false premise that a carrier may not do more at one place than he does at another for the same price, a proposition that is refuted in every day's transactions in the carriage of freight. In this case it is shown that freight is carried by Ionia 34 miles to Grand Rapids and nothing is charged for the carriage for that distance. It costs the carrier something to do this. It would cost the Grand Rapids merchant some money to bring the goods from the place where the Ionia merchant takes his. Is it permissible to say that by the amount of that cost, either to the carrier or to the Grand Rapids merchant, the rate common to both places is lessened to the Grand Rapids merchant and the Ionia merchant is discriminated against?

It is also said that because the respondent has grouped Grand Rapids and Ionia together, it conclusively admits that so far as transportation from the East to the warehouse of the company at the two places is concerned it is under substantially similar circumstances and conditions. I do not understand the admission to be as stated. The warehouse at Grand Rapids is not in fact the terminus of transportation which the respondent had in mind when it made the grouping; nor does the fact that places are grouped make it necessary to assume that they shall all have the same accommodations. It might as well be said that, having regard to the long and short haul clause, such grouping is a conclusive admission that the distance from the East to Grand Rapids is not greater than that to Ionia, whereas nobody supposes that to be admitted. So far as there is any admission, it is only that the distances are nearly the same, practically the same in the large view of the subject. It seem to me that we are not to allow our vision to be suddenly and capriciously narrowed, but should continue to see the subject on the same wide field in all its relations.

Tied to this erroneous assumption is another proposition, which standing by itself may be quite true, namely, that any benefit in relation to the shipment of goods having a definite money value conferred gratis by the carrier upon one shipper which is not conferred upon another where the service is admittedly under similar conditions, is an undue reduction in the price of carriage to the former, and therefore illegal. But this proposition and the conclusion, as applied to such facts as we have in the present case, depend upon the assumption that there is any money value conferred gratis. If the incidents of delivery at the terminus, whether

by the usage there it be by one means or another, are included in the contract and price for carriage, the costs of those incidents can not be scaled off and carried back upon the whole price in order to reduce the price of the mere carriage between station houses. Nor do the similar conditions exist if one place is out of all proportion with another, and the station at the small place is located close to the local business, and at the larger one it is a long distance off. The exact dissimilarity is not overcome until this disadvantage at the larger place is measurably reduced. It is impossible to make the adjustment nicely. If it be said that free cartage, as it is erroneously called, more than makes up for the unequality of conditions, and that to the extent of the excess it is a gratuity, one answer is, that the excess thus afforded is not greater than the deficit or disadvantage which would exist without it. It is the mere oscillation of the pendulum swinging within lawful limits.

Pertinent to this is the suggestion that it would, of course, not be a discrimination that could be complained of that the company puts its station at one town nearer the business center than at another, and if free cartage could be said to properly make up for the longer distance of respondent's station from the business center of Grand Rapids, and in this respect to put the Grand Rapids merchants on the same footing as Ionia merchants with their proximity to the station, then it would seem to be unobjectionable, because justified by the dissimilar circumstances. But, it is asked, can this be said? And the argument in support of a negative answer is that if the defendant's station at Grand Rapids
111 were moved into the business center, the shippers would still have to pay for the cartage. It may be that it would be a less price, but still they would have to pay. The equalizing of the conditions between the two places in this respect would be complete by a charge for cartage by the railway company at the lower rate which would be charged for cartage were the station in the city. The proposition admits that the practice would be unobjectionable, because justified by the dissimilar circumstances, if only the disadvantage were overcome, but the gravamen of the mischief consists, it is urged, in the remedy being overdone. But as the overdoing is not greater that the mischief overcome, and the result is not injurious to the public but beneficial rather, I can see no reason for condemning the practice as a whole.

And even if the argument above quoted were sound, it would not justify the order made by the Commission, which not only forbids the alleged mischief, but the remedy to the public for an acknowledged disadvantage. Upon the theory suggested the real unlawfulness of the practice is in the excess referred to, and the order should have been appropriate to its correction and stopped there, instead of utterly depriving the public of a remedy "justified by the dissimilar circumstances." But, as already said, the court can make no new order. The order of the Commission stands or falls as made. The theory last mentioned and the argument in its support proceed upon too nice distinctions. Such close balancing is impracticable, and is not attempted in the administration of the statute generally.

In answer to the claim that on account of its greatly larger size and business Grand Rapids is entitled to greater facilities than a small place, it is said that in so far as the greater amount of business enables the

railway company to do carting at a cheaper rate at Grand Rapids than at Ionia, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places.

The dissimilarity of conditions which is thus admitted to be legitimate ground for different rates of cartage prices at the two places consists primarily in the greater amount of business at Grand Rapids, and consequentially in the fact that therefore it can be more cheaply done. But the cartage is parcel only of the whole transportation. It is done to augment the bulk of that business. And no reason is perceived why the discrimination which would justify a larger cartage for the same money would not justify a larger service in the whole transportation, the business being so much larger as to make it an object on ordinary business principles for the carrier to render that service in order to
112 gain the profits according from its greater volume. The public at Grand Rapids are entitled to enjoy the corresponding advantage which results from the aggregation of their business, and if that aggregation justifies their superior accommodation on business principles, there is nothing in the interstate-commerce law, fairly interpreted, which prevents their enjoyment of it.

The breeding of artificial distinctions in this law is, in my opinion, very objectionable and very likely to impair its utility to the public, who are the parties most likely to suffer on every occasion when losing sight of its main object the Commission or the courts listen to the ingenious weaving of unsubstantial fabrics among the branches of the statute by interested parties.

In this opinion the result is reached upon considerations which do not depend upon any supposed right of the respondent to be protected in the privilege of putting itself upon a footing of equality in competition for the business at Grand Rapids. The Commission has, in many instances, recognized such a right, and incidentally, at least, sought to protect it. The circuit courts in the fifth and ninth circuits have held that the competition of other roads might produce such dissimilarity in conditions as the statute recognizes in permitting the rendition of greater service for the same compensation. To what extent this may be carried it has not been deemed necessary here to say.

For the reasons given, and with great respect to the Commission, I can not bring myself to the conclusion that their order is right, and I feel bound to withhold my assent from it. My conviction is that it would establish a precedent the principle of which, carried to its logical conclusion, would reach far into existing usages and be extremely injurious to the interests of the public in many localities, without any corresponding advantages to the public anywhere else.

June 3rd, 1893.

(Endorsed:) No. 1059. The circuit court of the United States for the western district of Michigan, southern division. In equity. Interstate Commerce Commission vs. Detroit, Grand Haven & Milwaukee R'y Co. Opinion of Severens, district judge. Filed Oct. 6, 1893. John McQuewan, deputy clerk.

March term, A. D. 1894.

TUESDAY, *August 7, 1894.*

The court met pursuant to adjournment. Present the Honorable Henry F. Severens, district judge.

113 THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company. } No. 1059.

This cause being at issue on petition and answer, and testimony having this day been duly taken and filed and the cause having this day been duly heard on pleadings, proofs, and the arguments of counsel for the respective parties, and it appearing to the satisfaction of the court:

1st. That the petitioner the Interstate Commerce Commission, after due hearing of the parties in the case of Mary O. Stone and Thomas Carten against the respondent The Detroit, Grand Haven & Milwaukee Railway Company, then pending before said Commission, did, on the 12th day of May, 1890, duly and regularly make and enter an order against said respondent, which, after reciting the facts found by said Interstate Commerce Commission, concluded as follows, viz:

"It ordered and adjudged that the defendant The Detroit, Grand Haven & Milwaukee Railway Company be, and it is hereby, required, within thirty days from and after the service of a copy of the report and opinion in this proceeding and of this order, to wholly cease and desist from furnishing free cartage of freights at Grand Rapids, in the State of Michigan, whereby rebates from its lawfully published schedules of rates, fares, and charges at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from Eastern points to Grand Rapids aforesaid are made less than charges for transportation over its line of like kinds of property shipped fromthe same Eastern points to Ionia, in the State of Michigan.

"And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce."

2d. That a certified copy of said order was subsequently served upon said respondent, who, for more than thirty days thereafter and prior to the filing of the petition in this case, had neglected and refused to comply with the same.

And it further appearing to the satisfaction of the court that the respondent, in affording free cartage at the city of Grand Rapids, in the State of Michigan, of interstate traffic between its stations and said city, while not affording the same at the city of Ionia, in said State, in
114 respect of the same class of traffic (which was the subject-matter of the complaint of said Stone & Carten before the Interstate Commerce Commission), violated the provisions of the act of Congress entitled "An act to regulate commerce," by thus discriminating against

said city of Ionia; and it appearing that said respondent is still continuing said act of discrimination:

It is hereby ordered, adjudged, and decreed that the mandatory writ of injunction of this court do issue to said respondent The Detroit, Grand Haven & Milwaukee Railway Company, commanding it and its officers and agents to forthwith desist and refrain from affording said free cartage at said city of Grand Rapids, unless a like service or its equivalent in value by reduced rates be at the same time afforded at said city of Ionia, and unless the fact that such free cartage or such equivalent reduced rate is afforded at both points shall be noted on the established tariffs of freights and charges published as required by law.

The right of the petitioners is reserved to apply to this court for any further or other order in this cause based on the neglect or failure of said respondent promptly and fully to comply with the letter and spirit of this decree.

The circuit court of the United States for the western district of Michigan, southern division. In equity.

THE INTERSTATE COMMERCE COMMISSION, COMPLAINANT,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, DEFENDANT.

The above-named defendant The Detroit, Grand Haven & Milwaukee Railway Company, conceiving itself aggrieved by the decree entered in said cause on the seventh day of August, 1894, hereby prays to be allowed an appeal therefrom to the United States circuit court of appeals for the sixth circuit, and prays that said decree may be reversed.

And that a transcript of the record and proceedings, the evidence, exhibits, and all papers necessary to be considered upon such appeal and upon which said decree was made, be duly authenticated and sent to said United States circuit court of appeals.

E. W. MEDDAUGH,
Solicitor for said Defendant
The Detroit, Grand Haven & Milwaukee Railway Company.

Dated August 14, 1894.

115 *Assignment of errors.*

The circuit court of the United States for the western district of Michigan, southern division. In equity.

INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

And now comes the defendant in the above-entitled cause, and for assignment of errors in the decree therein rendered says:

(1) The court erred in holding that the free carting of traffic by the defendant at the city of Grand Rapids between its station and the shippers and consignees, while not affording the same to the shippers and consignees at its Ionia station, was a violation of the interstate-commerce act.

(2) The court erred in holding that such cartage at said city of Grand Rapids was equivalent to rebate payments made to such shippers at that place, and was therefore a violation of said interstate-commerce act.

(3) The court erred in holding that such free cartage at said city of Grand Rapids, while the same was not afforded to shippers and consignees at said Ionia station, was equivalent to charging more for the shorter haul than for the longer, and was therefore a violation of the fourth section of said interstate-commerce act.

(4) It conclusively appeared from the testimony in said case and the Interstate Commerce Commission found as a fact in their report on which the order was based which was sought to be enforced in this proceeding, that there was practically no competition in traffic between said city of Grand Rapids and said city of Ionia, and the court therefore erred in holding that the free cartage of traffic between the station at Grand Rapids and the shippers and consignees at that place was an unjust discrimination against Messrs. Stone and Carten, or other shippers and consignees at said city of Ionia.

(5) The court erred in decreeing, in modification of the order of said Interstate Commerce Commission, that said defendant should desist and refrain from affording such free cartage service at said city of Grand Rapids unless like service, or its equivalent in value by reduced rates, should be afforded in respect of the same class of traffic at said city of Ionia.

116 (6) The court erred in holding and decreeing that said order of the Interstate Commerce Commission was a lawful order within the meaning of said interstate-commerce act and in the enforcement of it.

(7) The court erred in holding and decreeing that the cartage of tariff by defendant between its station and the shippers and consignees at said city of Grand Rapids was free cartage or without compensation to the defendant therefor.

(8) The court erred in holding and decreeing that said carting of traffic by the defendant between its station at said city of Grand Rapids and the places of shipping and consignment of such tariff at said city was an undue or unreasonable performance or advantage to said city or to the shippers or consignees thereof.

(9) The court erred in holding and decreeing that said carting of traffic by defendant at said Grand Rapids station amounted to an undue or unreasonable prejudice or disadvantage to said city of Ionia or to said Stone & Carten or other shippers or consignees at the latter place.

E. W. MEDDAUGH,
Solicitor for the Defendant.

U. S. CIRCUIT COURT ROOM,
Grand Rapids, Aug. 21, 1894.

The within appeal is hereby allowed as prayed and the bond fixed at $2,000.

H. F. SEVERENS,
Dist. Judge.

(Endorsed:) No. 1059. U. S. circuit court, W. D. Mich., so. div'n. In equity. Interstate Commerce Commission vs. D., G. H. & M. Ry. Co. Petition for appeal and assignment of errors. Filed Aug. 14, 1894. Chas. L. Fitch, clerk.

Known all men by these presents, that we, the Detroit, Grand Haven & Milwaukee Railway Company, as principal, and C. Jesse Church and Frederick W. Stevens, as sureties, are held and firmly bound unto the Interstate Commerce Commission of the United States in the sum of two thousand dollars ($2,000), lawful money of the United States, to which payment, well and truly to be made, the said principal binds itself, and the said sureties bind themselves, their heirs, executors, and administrators, jointly and severally. Sealed with our seals and dated the 15th day of August, 1894.

Whereas the said principal has prayed an appeal to the United States circuit court of appeals for the sixth circuit to reverse a decree of the circuit court of the United States for the western district of Michi-
117 gan, southern division, in equity, in a cause in which the said Interstate Commerce Commission is complainant and the said principal is defendant.

Now, therefore, the condition of this obligation is such, that if the above-named Detroit, Grand Haven & Milwaukee Railway Company shall prosecute its said appeal to effect, and answer all costs which may be awarded against it, if it fails to sustain its said appeal, then this obligation to be void, otherwise in force.

[Seal of the Detroit, Grand Haven & Milwaukee Railway Company.]

THE DETROIT, GRAND HAVEN & MIL. RAILWAY COMPANY.
Per L. J. SEARGEANT,
Its President.

C. JESSE CHURCH. [SEAL.]
FRED'K W. STEVENS. [SEAL.]

STATE OF MICHIGAN, *County of Montcalm, ss:*

C. Jesse Church, being duly sworn, deposes and says that he is worth in real property in the western district of Michigan, the sum of five thousand dollars, over and above all exemptions, set-offs, and liabilities, including liabilities as surety upon bonds heretofore executed.

C. JESSE CHURCH.

Subscribed and sworn to before me this 20th day of August, 1894.

CLAUDE V. COATS,
Notary Public, Montcalm County, Michigan.

STATE OF MICHIGAN, *County of Kent, ss:*

Fred'k W. Stevens, being duly sworn, deposes and says that he is worth, in real and personal property in the western district of Michigan, the sum of two thousand dollars, over and above all exemptions, set-offs, and liabilities, including liabilities as surety upon bonds heretofore executed.

FRED'K W. STEVENS.

Subscribed and sworn to before me this 21st day of August, 1894.

JACOB STEKETEE,
Notary Public, Kent County, Michigan.

U. S. CIRCUIT COURT ROOM,
Grand Rapids, Aug. 21st, 1894.

The within bond is hereby approved in substance and form, including the sufficiency of the sureties.

H. F. SEVERENS,
District Judge.

118 United States circuit court of appeals for the sixth circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To the Interstate Commerce Commission, greeting:

You are hereby cited and admonished to be and appear at a session of the United States circuit court of appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit on the 18th day of September next, pursuant to an appeal taken from the decree of the circuit court of the United States for the western district of Michigan, southern division, in equity, wherein the Detroit, Grand Haven & Milwaukee Railway Company is respondent and appellant and you are petitioner and appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of August, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

H. F. SEVERENS,
Dist. Judge.

U. S. DISTRICT ATTY'S OFFICE, *Grand Rapids.*

Due service of a copy of the within citation is hereby admitted this 21st day of August, 1894.

JOHN POWER,
U. S. Attorney.
By RICHARD L. NEWNHAM,
Ass't U. S. Attorney.

(Endorsed:) No. 1059. The circuit court of the United States for the western district of Michigan, southern division. In equity. Interstate Commerce Commission vs. Detroit, Grand Haven & Milwaukee Railway Company. Citation. Filed Aug. 21, 1894. Chas. L. Fitch, clerk.

THE UNITED STATES OF AMERICA,
Western District of Michigan, Southern Division, ss:

I, Charles L. Fitch, clerk of the circuit court of the United States for the western district of Michigan, do hereby certify that the annexed are
119 the original petition for order allowing appeal, assignment of errors, order allowing appeal, and citation, in the within-entitled cause, together with true and compared copies of the petition and exhibits, answer, testimony, and opinions of the judges now on file in

said cause, and a true and compared copy of the final decree entered of record therein, together constituting the whole record upon the appeal allowed in said cause.

Witness my official signature and the seal of said circuit court, at Grand Rapids, in said district and division, this 6th day of September, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

[SEAL.] CHARLES L. FITCH, *Clerk.*

Filed Sep. 10, 1894.

WALTER S. HARSHA, *Clerk.*

120 And afterwards, to wit, on October 8th, 1894, the following stipulation was filed in this court, which reads and is in the words and figures following:

United States of America. In the circuit court of appeals.

THE INTERSTATE COMMERCE COMMISSION
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Company.

It is hereby stipulated and agreed that the above-entitled may be continued for the October session, but with the express understanding that it shall be for argument at the February session, 1895.

JOHN POWER,
Attorney for Plaintiff.
E. W. MEDDAUGH,
Attorney for Defendant.

Dated September 30th, 1894.

And afterwards, to wit, on October 10th, 1894, the following order was made upon the minutes of said court, clothed in the words and figures following:

United States circuit court of appeals for the sixth circuit. Appeal from the circuit court for the western district of Michigan.

THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Co.
vs.
THE INTERSTATE COMMERCE COMMISSION. No. 252.

121 A stipulation for continuance having been filed in this cause, the same is continued for hearing to the February session, 1895.

And afterwards, to wit, on November 7th, 1894, the following order was made in this court, which reads and is in the words and figures following:

United States circuit court of appeals for the sixth circuit. Appeal from the circuit court for the western district of Michigan.

THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Co. *vs.* THE INTERSTATE COMMERCE COMMISSION.	No. 252.

By order of court, this cause is continued to the February session, 1895.

And afterwards, to wit, on February 26th, 1895, the following order was made upon the journal of said court, clothed in the words and figures following:

United States circuit court of appeals for the sixth circuit. Appeal from the circuit court for the western district of Michigan.

THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Co. *vs.* THE INTERSTATE COMMERCE COMMISSION.	No. 252.

This cause came on to be heard this day and was argued by Mr. Harrison Geer for the appellant and by Mr. D. E. Thomas for the
122 appellee and Mr. Otto Kirchner for the appellant, and was submitted to the court.

And afterwards, on April 14th, 1896, the following decree was entered in said cause, which reads and is as follows:

United States circuit court of appeals for the sixth circuit. Appeal from the circuit court for the western district of Michigan.

THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Co. *vs.* THE INTERSTATE COMMERCE COMMISSION.	No. 252.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Michigan, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, reversed with costs; and the cause is remanded to the circuit court with directions to set aside the decree and dismiss the petition of the Interstate Commerce Commission, with all costs to be taxed against the Commission according to law.

And afterwards, on the same day, to wit, April 14th, 1896, the following opinion was delivered by this court, which reads and is as follows:

Opinion.

123 United States circuit court of appeals for the sixth circuit. Appeal from the circuit court of the United States for the southern division of the western district of Michigan.

DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY Company, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION, APPELLEE. } No. 252.

Submitted Feb'y 26, 1895. Decided April 14, 1896.
Before Lurton, circuit judge, and Hammond and Sage, district judges.

STATEMENT OF THE CASE.

This is a petition by the Inter-state Commerce Commission to compel the defendant railway company to obey its order in the matter of the application of Stone & Carten, asking that the company be required to desist from certain alleged violations of the interstate-commerce act found by the Commission to have been practiced by it. Being formally notified that the order would not be obeyed, the Commissioners filed this petition.

There was a disagreement between the two judges holding the circuit court, and a decree having been made in favor of the Commission, in pursuance of the opinion of the presiding judge, as required by the statute, the defendant company appealed.

It is not necessary to state here the details of fact appearing in the record of the proceedings before the Interstate Commerce Commission, which are reported in the case of Stone & Carten vs. The Detroit, Grand Haven & Milwaukee Railroad Company, 3 Int. C. C. Rep., 613, nor in the record of the case in the circuit court, reported sub nom. Interstate Commerce Commission vs. Detroit, G. H. & M. Ry. Co., 57 Fed. Rep., 1005; and we shall abridge them within the limits of this statement sufficiently extended to explain our judgment.

124 [2 The defendant company, although lying wholly within the State of Michigan, is, through its traffic connections, subject to the interstate-commerce act. The city of Grand Rapids and the town of Ionia, respectively, are stations on this railway 37 miles from each other, Ionia being that much nearer to the eastern terminus from and to which the interstate traffic in that direction goes on over the defendant's railway to and from Ionia and Grand Rapids. These two stations being grouped together on the published schedules of the company, an equal rate is charged to shippers at either place. Grand Rapids is a city of 70,000 and Ionia of 6,000 inhabitants. In 1887 the aggregate carriage of goods from the one was 985,685 and for the other 55,000 tons.

In 1858 the station house at Grand Rapids was first located where it now is, an average distance of one and one-fourth miles from the business sections of the city. Two rival railway companies competing with the

defendant company for the interstate railway traffic to and from markets to the eastward have located their station houses within an average distance of one-fourth of a mile from the business sections of the city. More than twenty-five years ago the defendant company established at Grand Rapids a system of collecting and delivering goods upon the premises of the consignors and consignees by a cartage service which it provides and for which no other charge is made than that general sum appearing on the published schedules of rates as the equal freighting charge with that made to Ionia. It does not appear by the proof what may be the cost to the carrier of rail transportation proper to either place, nor whether the cartage is free as being given without addition to that cost or is added to it and included in the general sum. The collecting and delivering is done by persons employed and paid by the defendant railway company for that service. No such collecting and delivering was ever or is now done at Ionia. The cost of carting at either place is estimated to be the same per hundredweight—about two cents. It has long been customary in Michigan for railway companies to so collect and deliver goods in exceptional places, and in 1871, by an act of the legislature, quoted in the opinion, special authority in that behalf was granted to them.

Competition between the merchants and dealers at Ionia and those at Grand Rapids is very slight—practically amounting to nothing. The complainants before the Interstate Commerce Commission are merchants at Ionia, and their objection is that the collecting and delivering service furnished by the defendant company at Grand Rapids is an unlawful discrimination under the interstate-commerce acts; and upon an official investigation the Commission, holding it to be so, directed the following order to issue:

"At a general session of the Interstate Commerce Commission, held at its office in Washington, on the twelfth day of May, A. D. 1890.

Present: Hon. Thomas M. Cooley, chairman, Hon. William R. Morrison, Hon. Augustus Schoonmaker, Hon. Walter L. Bragg, Hon. Wheelock G. Veazey, commissioners.

MARY O. STONE AND THOMAS CARTEN
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY.

This case being at issue upon complaint and answer on file, and having been duly assigned for hearing on the 29th day of
125 [3 January, 1889, and a hearing having been had upon the pleadings, proofs, and arguments of counsel, and the report and opinion of the Commission having been made and filed, whereby, among other things, it is found and decided that the defendant has put into effect a tariff schedule by which rates and charges for transportation of freights from Eastern points to Ionia and Grand Rapids, points on its line in the State of Michigan, are made the same, Ionia being a shorter distance from said Eastern points than Grand Rapids, and that the defendant, in connection with its transportation service furnishes free cartage of freights at Grand Rapids to and from its station and its patrons' places of business,

and does not furnish such free cartage at Ionia, and that by reason thereof said defendant does unlawfully give rebates from its published tariff of schedule rates, fares, and charges at Grand Rapids to shippers and consignees at that point, and does by the same means unlawfully charge and receive a greater compensation in the aggregate for the transportation of like kinds of property under substantially similar circumstances and conditions for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included within the longer distance, in violation of the provisions of the act to regulate commerce.

It is ordered and adjudged that the defendant The Detroit, Grand Haven & Milwaukee Railway Company be, and it is hereby, required, within thirty days from and after the service of a copy of the report and opinion in this proceeding, and of this order, to wholly cease and desist from furnishing free cartage of freights at Grand Rapids, in the State of Michigan, whereby rebates from its lawfully published schedule of rates, fares, and charges at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from Eastern points to Grand Rapids aforesaid are made less than charges for the transportation over its line of like kinds of property shipped from the same Eastern points to Ionia, in the State of Michigan.

And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the Commission herein in conformity with the provisions of the fifteenth section of the act to regulate commerce.

The defendant company having declined to comply with this order of the Commission, a petition was filed praying for an enforcement of its order by injunction or other process, mandatory or otherwise. Upon final hearing the circuit court entered the decree from which the appeal is taken. It is materially different from the order of the Commission heretofore set out, and, excluding the introductory recitals, is as follows:

And it further appearing to the satisfaction of the court that the respondent, in affording free cartage at the city of Grand Rapids, in the State of Michigan, of interstate traffic between its stations and said city, while not affording the same at the city of Ionia, in said State, in respect of the same class of traffic (which was the subject-matter of the complaint of said Stone & Carten before the Interstate Commerce Commission), violated the provisions of the act of Congress entitled "An act to regulate commerce," by thus discriminating against said city of Ionia; and it appearing that said respondent is still continuing said act of discrimination:

It is hereby ordered, adjudged, and decreed that the mandatory writ of injunction of this court do issue to said respondent The
126 [4 Detroit, Grand Haven & Milwaukee Railway Company, commanding it and its officers and agents to forthwith desist and refrain from affording said free cartage at said city of Grand Rapids, unless a like service or its equivalent in value by reduced rates be at the same time afforded at said city of Ionia, and unless the fact that such free cartage or such equivalent reduced rate is afforded at both points shall be noted on the established tariffs of freights and charges published as required by law.

The right of the petitioners is reserved to apply to this court for any further or other order in this cause based on the neglect or failure of said respondent promptly and fully to comply with the letter and spirit of this decree.

It was one of the contentions of the defendant railway company that this proceeding was in fact instigated and carried on by their rivals at Grand Rapids, and not really by the complaining merchants at Ionia. We do not deem it necessary, and it was not thought so either by the Commission or the circuit court, to decide or notice that fact, since anybody may make such a complaint or the Commission may proceed upon its own motion, and neither any interest in the subject-matter nor any injury to him who complains is technically necessary to support a complaint. That fact becomes, therefore, quite immaterial.

The assignments of error may be grouped into three:

First. That there is on the facts of the case no violation of the act of Congress.

Second. That if there had been, the order of the Interstate Commerce Commission is not the proper one to correct the abuse, and is an unlawful exercise of its authority in the premises.

Third. That the circuit court had no power to modify, change, or correct the unlawful order of the Commission, as was done by its decree.

HAMMOND, district judge, delivered the opinion of the court:

Before the development of railroads, carriers overland gathered the goods from the premises of the consignor and delivered them at the door of the consignee, charging a single rate for the whole service. Carriers by water ex necessitate rei received the goods at the ship side or the wharfs adjacent thereto and delivered them at like places, the consignors and consignees, respectively, bringing them to and taking them from those places at their own expense. It was doubted at one time whether the cartmen engaged in the business of hauling the goods from place to place in the same town were common carriers, subject to responsibility as such, or only private carriers, but it has probably been since settled that they are subject to the larger liability. (Brind v. Dale, 8 C. & P., 207; Hutch. Carr., secs. 59, 61.)

By the common law, carriers overland were charged, among other things, with an obligation to deliver personally, while carriers by water were, for the reason stated, absolved from that obligation upon giving notice to the consignee of the arrival of the goods and the place where they were deposited. It is not necessary to refer more specifically to the incidents of the collection and delivery by either class of carriers, since our only purpose is to call attention to the difference in that accessorial service to which cartage belongs, as it existed at the time when railroads
127 [5 first came into existence. (Hutch. Carr., secs. 59, 69, 70, 82, 86, 94, 95, 295, 340, 357, 365, 366.) It is manifest that the new business of carrying goods overland by rail would assimilate itself, from a like necessity, rather to the mode in use by water carriers than the other in this matter of collecting and delivering the goods from and to the premises of the consignors and consignees. (Hutch. Carr., sec. 367.) It is, however, a somewhat curious result that, notwithstanding this necessity of the railroads to carry only from station to station on their lines

of rails, as ships from port to port on the waterways, the new-born railroad companies in England from the beginning, through adherence to custom probably, in part, but more through some peculiarities in conducting the business of carriage of goods in that country, to be presently noticed, forced the mode of collecting and delivering into a comformity rather with the method then in use by land carriers; while in America, as we judicially know, the almost universal practice of the railroad people is to receive and deliver as water carriers do.

The accessorial cartage, therefore, has become here an almost wholly independent business as it was and is in water carriage with which the railroads have nothing to do; but in England it was otherwise, and long before the modern traffic acts, like our interstate-commerce act, and since, the courts of England were called upon frequently to deal with it in its connection with railroads and their duty either at common law, under their special acts of incorporation, or under these tariff acts, to treat all customers without unjust discrimination in the carriage of goods and their compensation therefor. Our American books, so far as the investigations of counsel and our own have gone, seem almost entirely destitute of any cases upon the subject. The English cases require the most careful reading and close discrimination with reference to the separable nature of this accessorial service to avoid a misleading confusion in their bearing upon this subject and especially in their application to any occasional American practice of collecting and delivering to and from railroads by a cartage service. It is a mistake to suppose that either in England or America this cartage service for railroad transportation is a part and parcel of that transportation itself, strictly considered, as it certainly was in the previously existing carriage by land; but it is in both countries, as it always was in water carriage, a distinct, disconnected, and separate service from the rail carriage and in its nature, as we have called it, purely accessorial. It is more certainly so with us than in England, but the confusion about it is easily accounted for when we come to investigate the legislation and decisions in regard to it. At first in England, if not here, the conception of a railroad was that it was like the King's highway—open to all who wished to go upon it for the transportation of goods along its lines, and the earliest acts authorizing their construction proceeding upon this theory, and the rules contained in the legislation for the regulation of the "tolls," "tonnage," "rates," and "charges" were based upon that conception of their use. The idea that the railroad owner should be himself a carrier of goods was at first almost wanting in the legislation concerning railroads. Very soon in the process of evolution he was authorized to become a carrier, others having the right, however, to share that business with him, the railroad owner most conveniently furnishing the motor power, whether of engines or other kinds, the trucks and carriages, just as he furnished the roadbed and lines of rails, and this whether he himself or some other contractor was the carrier of the goods. But the business of carriage was
128 [6 at first almost exclusively in the hands of other contractors than railroad owners, they occupying a relation to the lines of railway very much like that which, in our day, the express companies in this country bear to them, only the business of these "carriers" was much more extensive, embracing all goods as well as small parcels for

quick delivery. Paying the railroad company its "tonnage," "rates," "tolls," and "charges" for the use of the road, these outside carriers depended largely, if not wholly, for their profits upon compensation for the accessorial service of collection and delivery, including particularly the cartage of the goods. Naturally they charged a lump sum to their customers which covered the compensation for their own accessorial service and the charges which they paid to the railroad company, there being no separation or distinction between the two, any more than in the old fashion land carriage, as far as the shipper was concerned, but in the settlement between the railroad company and the "carrier" the distinction appeared.

When the railroad companies under the authority of subsequent legislation assumed for themselves the functions of "carrier" as contradistinguished from those of owner of the road and its appliances, they directly came into competition with those outside carriers who used their lines; and in the matter of collecting and delivering almost necessarily had themselves to do the accessorial work, including cartage, and must also necessarily either furnish the facilities for doing it or farm it out to others, sometimes doing one and sometimes the other; and in the process of farming out this collecting and delivery they oftentimes, if not always, engaged some carrier who was already equipped for the service in his own business, and he did the carting and other accessorial service for the goods of which the railroad companies became the carriers, as well as his own. The compensation for this service when the companies themselves were carriers was sometimes charged separately to the consignors and consignees, and sometimes included in a lump sum, including the railroad rate as well. In their capacity as owners of the railroad and its appliances they were compelled, both by the common law and by the special acts of legislation authorizing the construction and use of the road, and later by the English traffic acts, to submit to an equality of compensation and use of the road and its facilities with the other carriers who had a right and did, in fact, use their road and its appliances, just as they were compelled by the common law and the same statutes to treat all shippers alike in their capacity as carriers—not owners. The human nature of the situation was that they should undertake as much as possible to favor their own business as carriers, and as a matter of fact they sought to draw to themselves the whole business of transportation, including this accessorial service and the profits that belonged to it. With like human nature the outside carriers resented and resisted this practice of the railroad companies, and litigation was rife between them, which almost always involved this very subject of cartage and other accessorial service. One of the methods of the railroad companies in attracting custom to themselves as carriers was to offer what is termed "free cartage," and which was or was not free in fact according to circumstances; and in order to determine whether it was free or not there was of course required a very exact and almost mathematical knowledge of the actual cost of carriage on the railroad proper. Particularly was this so where in the billing to the customer the aggregate sum for the whole service was charged according to the ancient common-law practice without
129 [7 separating the charges for the cartage. It is with this condition, habit, method, and practice that the English cases had to deal, and it is in that light they must be read to avoid confusion.

We know that in the growth of our American system of railroad transportation no such conditions have been developed. In this case the proof is that it is very exceptional for the railroads to do the carting required in collecting and delivering the goods, and it is said in argument that it obtains nowhere except upon the Grand Trunk Railroad and those connected with it or influenced by it, and this is perhaps accounted for by the fact that the Grand Trunk system has its origin and home in Canada, where, most likely, they would follow the English practice rather than ours. So entirely separate, however, is this accessorial service from the general service of transportation upon the rails, that in England it was sometimes thought to require special authority of Parliament to enable the railroad owners to engage in it—Re Baxendale, etc., 5 C. B. N. S., 309, 327, where an act of Parliament is quoted to that effect, authorizing "special facilities" to be acquired by contract, among other like accessorial services, the collection and delivery of the goods being included—and to secure equality in that service itself a special tribunal, having none other than this service within its control, was empowered to act—just as it was at first thought to require the same sanction to enable them to engage in the business of carrying goods in contradistinction to their ownership of the railroad; and we find in this very case that special legislation has been had in Michigan, where the case arose, authorizing railway companies to make personal delivery by cartage service, under certain conditions and restrictions specified in the act. It is as follows:

"SECTION 3. Every railway company in this State is authorized to make personal delivery of every parcel, package, or quality of goods or property, if the consignee of such property shall reside within two miles of the terminus or railway station, or other terminus of the carriage of such property by the main line of such carrier, and they are hereby authorized to employ or own all the means necessary to perform such duty, and to place the men and vehicles therefor under the government and sole regulation of the superintendent or other principal officers of such companies. Such delivery shall be at the house, shop, office, or other place of business of the consignee, according to the nature of such property and where the owner or consignee desires to have the same." (Compiled Laws 1871, sec. 2375.)

In our American legislation authorizing the railroad companies not only to own the railroads, but also to enjoy substantially a monopoly of the carriage of goods upon them—whether special sanction is needed to authorize them to engage in the accessorial business of collecting and distributing the goods to and from the trains we need not decide—but the existence of such legislation here and in England is quite conclusive of the separable and independent character of that service in its relation to transportation over the rails. More than this, notwithstanding the confusion in practice which, as we have pointed out, obtains in England, it has been time and time again decided in the cases which we shall presently cite, and all of which more or less involve the question of cartage and other like accessorial service, that it is a separate and distinct business from that of transportation over the rails. The English judges have been confused, as we have been, by the mere terminology or nomenclature which has prevailed in practice, and in one case it is said
130 [8 that the phrase "terminal facilities" seems to have been appropriated in railroad parlance to other facilities than those which

we have called accessorial, although they are very much alike in their legal and practical nature, if not identical in their signification, one judge, for avowed purpose of distinguishing them, calling the latter "initial and terminating services." It seems to us quite immaterial whether you call that transfer service—which in some places is termed "lighterage" or "ferriage," in other places "belt-line services," in still others "spur-track service"—terminal facilities or by some other name, if its purpose be to collect and distribute the goods carried when they are taken on or off the rails; it is, in the sense in which we have used the term, accessorial, and, having the same objective purpose as the cartage, such as we have in this case, the considerations which enter into the determination of questions of unlawful discrimination should equally well apply to either. Mere physical connection, being more or less close, does not seem to us to make much difference where there is no real distinction and separation in the nature and character of the business itself. Whatever the appliances used in collection and delivery, it is at last merely an accessorial service. And, however it may be as to other such appliances, the cartage used in collecting and delivering at the initial and the terminating points is called indiscriminately by the judges "a separate business," one "beyond their line," one "not incident to them in their character of a railway company," and one "that is ancillary in its nature," one judge calling the cartmen "collecting carriers;" another speaks of it as "de hors the carriage" and "subsidiary thereto," and of the carriage and cartage as "totally distinct transactions," and to have "mixed up the two charges" in dealing with customers is said to have been unlawful. Cockburn, Ch. J., in one of the cases uses this language: "We think this argument rests upon two obvious fallacies—first, that of supposing that the whole charge in question is made by the company in reference to their character and interest with respect to the railway, whereas in reality the charge is made by them in a character and interest independent of the railway, namely, as carriers to and from the terminii of the railway; second, that the company can convert that which is in reality a charge for collecting and delivering as well as for carrying into one for carrying only by affixing to it the latter denomination in their table of rates." Everywhere this practice is condemned, because the services are distinct and should be separately scheduled and so treated in the book-keeping of the company. The Commission and the court below ignored this separation by treating the carriage on the rails and the cartage as a continuous carriage.

These English cases abundantly establish three propositions in relation to this subject: (1) That the collecting and delivery of goods is a separate and distinct business, notwithstanding the confusion to which we have adverted; (2) That the railroad companies, undertaking to do for themselves this separate business, can not, by consolidating the compensation for each, avoid the restrictions that have been imposed upon them in respect of unlawful discriminations, and it is amply within the power of the railway commissions and the courts, according to the facts of each particular case, to separate the two in order to prevent such an unlawful combination; (3) That, notwithstanding the separable and independent character of the two services, both, whether in the hands of the same or separate carriers, are subject to the rules and regulations prescribed by

law to prevent unlawful discriminations. (Pickford v. Grand
131 [9 June. Ry. Co., 10 Mees & Welsb., 399, A. D. 1842; Parker v.
Great W. Ry. Co., 7 Man. & Gr., 253, A. D. 1844; Parker v. Great W. Ry. Co., 6 El. and Bl., 77, A. D. 1856; Baxendale v. North Devon Ry. Co., 3 C. B. N. S., 324, A. D. 1857; Baxendale v. Great W. Ry. Co., 5 C. B. N. S., 309, A. D. 1858; S. C. Id., 336, A. D. 1858; Garton v. Great W. Ry. Co., Id., 669, A. D. 1859; Garton v. Bristol & Exeter Ry. Co., 6 C. B. N. S., 639, A. D. 1859; S. C., 1 B. & S. Q. B., 112, A. D. 1861; Pegler v. Monmouthshire Ry. Co., 6 Hurl. & Nor., 644, A. D. 1861; Baxendale v. Bristol & Exeter Ry. Co., 11 C. B. N. S., 787, A. D. 1862; Baxendale v. Great W. Ry. Co., 14 C. B. N. S., 1, A. D. 1863; Baxendale v. Great W. Ry. Co., 16 C. B. N. S., 137, A. D. 1864; Palmer v. London & S. W. Ry. Co., L. R., 1 C. P., 588, A. D. 1866; West v. London & N. W. Ry., L. R., 5 C. P., 622, A. D. 1869; Palmer v. London & Brighton, etc., Ry. Co., L. R., 6 C. P., 194, A. D. 1871; Parkinson v. Great W. Ry. Co., Id., 554, A. D. 1871; Evershed v. London & N. W. Ry. Co., 2 Q. B. D., 254, A. D. 1877; S. C., 3 Q. B. D., 134, A. D. 1877; S. C., 3 App. Cas., 1029, A. D. 1878; Manchester, Sheffield, etc., Ry. Co. v. Denaby Main Colliery Co., 13 Q. B. D., 674, A. D. 1884; S. C., 14 Q. B. D., 207, A. D. 1884; S. C., 11 App. Cas., 97, A. D. 1885; Liverpool Corn Trade Assn. v. London & N. W. Ry. Co. (1891), 2 Q. B. D., 229.)

Some of these later cases do not, perhaps, relate so much to cartage service as to the analogous service by spur tracks and sidings, but the other cases involving cartage being much discussed in them and treated on the same basis, they are cited to show how the earlier cases have been explained by the English courts themselves. Not one of these cases, nor any that our researches have disclosed, treats the subject of cartage, free or compensative, in any relation to different localities, nor in such form as we have it presented in this case; but they treat it with great fullness in its relation to those who do the work of carriage on the railroads in competition with the railway companies themselves, and that of collecting and delivering at the terminii, also in competition with the railroad companies and their agents or favorites, and they display a condition of freighting practice and of the law relating to it undoubtedly well known to those who framed our interstate-commerce act, which, we know, was largely modelled upon the similar legislation existing in England, under which these causes were decided. We have the authority of the Supreme Court of the United States in Interstate Commission v. The B. & O. R. R. Co., 145 U. S., 264, that Congress must have had this state of the law in mind, and that we may look to that fact while interpreting our own act. It should be observed, too, that Congress well knew that in America the railroad companies, with the rarest exceptions, such as that we are dealing with in Michigan, have nothing to do as a matter of practice with the collection and delivery of goods to and from the stations by engaging themselves in the business carting. We can not think that, under the circumstances, it was the intention of Congress to confuse in our legislation the carting to and from the stations with the transportation on the rails, and if the act can be interpreted to avoid that confusion, it should be done. We may suppose, since with us it is a business done almost exclusively by outsiders and rarely by the railroad

companies, and being usually done wholly within the territorial limits of a State, is not within the jurisdiction of Congress, that it was not intended to interfere with it except so far as it might affect
132 [10 directly the transportation of goods between the States, by being used as a device to evade the jurisdiction over that subject. We have no doubt that whenever it does become an element of interstate commerce, it is within the control of Congress and falls within the regulations of this act; but in determining how far its provisions apply to cartage, we should carefully keep in mind the fact that it is a separate and independent business, not usually carried on by the railroad companies themselves nor usually within the scope of the act or the power of Congress.

In the case we have in hand the proof shows that as a matter of fact the carting of which complaint is made is done by another under contract with the railroad company, and not by the railroad company itself. If Congress intended to enact that the railroad companies engaged in interstate commerce should not adopt at those points, respectively, any facilities, including cartage, which were useful and efficient in the necessary work of collecting the goods at the initial point of carriage and delivering them at the terminus, without affording at each and every station the same facilities or their equivalent in money by a reduction of rates, it would no doubt have said so in plain terms, and not left it to such implications as have been made upon this statute, requiring the nicest mathematical calculations to determine whether the right to that equivalency exists. It is only by knitting together the accessorial service and the carriage on the rails itself into one continuous carriage such as was familiar to the ancient common law, but has been, as we have shown, generally abandoned as to railroad transportation, that the carting service can be brought within the regulations of the act pertaining to equality of rates of compensation for the carriage.

We do not conceive that Congress had in mind to treat the accessorial service at each and every station—we mean that outside the rails and their appurtenances and appliances—and the carriage service on the rails as one continuous service, as it has treated the service by connecting lines, in order to equalize the charges to all localities alike. If the two be kept separated, as we have shown the preexisting law required they should, it then becomes a question of the regulation of equal facilities rather than of equal schedule rates of freight charges. In considering that statutory equality which it was evidently the purpose of the law to enforce in reference not only to schedule rates of freight charges, but to all other kinds of charges and to all "facilities" as well, the "circumstances and conditions," to use the language of the act itself, which naturally appear as elements in the problem of securing equality, would have a different bearing when we are dealing with individual shippers or classes of shippers to and from a station of the railway from that which it would have when we are dealing with different localities more or less widely separated from each other along the line of the railway. The question of collecting and delivering is not the same when we are looking to that equality which the law demands between all the customers of this company shipping, for example, at Grand Rapids or Ionia, respectively, and between these two localities themselves, or between those two

and the other stations on the line; and in reading this act for construction we must not ignore that difference. Nor in reading the cases pertaining to the subject must we overlook that difference, for it is all-important in helping us to understand them and in reaching a satisfactory result as to the proper interpretation of the act itself.

133 [11 Looking, then, at the framework of the interstate-commerce act, we see that it is the first section rather than the others which more directly deals with this subject. We do not for one moment doubt but that what we have termed "accessorial service" may be so manipulated as to violate any of the other sections, but what we suggest is, that it is more specifically provided for by the first section. The separation of the attendant service from that of the main transportation on the rails appears in the proviso of the very first paragraph of the act, showing conclusively that Congress was not inattentive to the disconnection between the two. There it is enacted, "That the provisions of this act shall not apply to the transportation of passengers or property, or to receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid." And in the last paragraph of the section this distinction appears by the very language used, when it is enacted that "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful." This language, interpreted by the light of the cases which we have cited and the practices to which we have called attention, unquestionably uses the word "charges" in the technical sense of segregated items of expense or dues which are to be demanded by the carrier for any service in connection with the transportation or with the receiving, delivering, storage, or handling of the goods, and each of these is required to be reasonable and just, and every unjust and unreasonable "charge" is prohibited. The words, "receiving," "delivering," "storage," and "handling," which describe that service which we have mentioned as "accessorial," including cartage, are not repeated in section 2, nor section 3, nor section 4, with the same particularity of expression, but it is an obvious rule of construction that in reading those sections the segregation of the first section should not be overlooked. It would, perhaps, not be an unreasonable construction of section 6 of the act to require that the railroad companies, in the printed schedules which they are to keep open to public inspection, should separately itemize any charges that they might make for carting in collecting or delivering the goods, and if, in this case, the complainants against the railroad company had asked to compel it to separate its compensation for transportation, as defined in the first section of the act, from its "charges" for cartage, it might have been directed to do so, though we need not decide that point. That section particularly required that they shall separate the "terminal charges," whatever that may mean, and any rules or regulations which may in any wise change, effect, or determine any part or the aggregate of such aforesaid "rates," "fares," and "charges," showing again, plainly, that Congress had this distinction in mind, for these very words are technical in their meaning.

The trouble in this case comes largely from the fact that the railroad company, ignoring the obvious and legal separation of the two services, has combined them into one, and neither in the findings of fact as they appear in the record either of the circuit court or before the Commission, nor in the proof, does that definitely appear which the cases we
134 [12 have cited show should always appear in determining a question like this, namely, what is the cost to the company of the actual carriage from station to station; so that we are left without any knowledge of the important fact whether or not this cartage is a source of profit to the company, or whether it is compensative in the sense that the cost of it is actually paid by the shipper, or free in the sense that it is gratuitous. Until we know that fact we can not tell whether there has been any unlawful discrimination or not, considering it solely as a matter of discrimination in the rates of freight, as it was considered by the Commission and in the court below. It appears in the proof that the value of the cartage is two cents per hundredweight, but it does not appear that, deducting that sum from the aggregate rate charged at Grand Rapids for both services, we thus arrive at the cost of the carriage on the rails proper; and therefore we can not know whether by the simple mathematical process of deducting the cost of cartage it is free or gratuitous, though it does mathematically thereby appear inexorably that the rate to Ionia would then be greater, just as it would inexorably appear if the sum to be deducted were fixed with reference to some other accessorial service at Grand Rapids than the cartage; and it would come to this, that every service at the two places should always be kept precisely equal in order to prevent this process of convicting the company of a mathematical inequality. But for the grouping that has been done, Grand Rapids could have been charged a larger rate than Ionia, the one, say, 52, and the other 50, and then by deducting the cartage no discrimination would mathematically appear, yet our question would be the same—whether or not the act requires that collection and delivery shall be alike at both places? We can not think that Congress intended to impose any such burden as this upon the railroad companies. The assumption that it does rests entirely upon the theory that statutory equality is to be ultimately resolved by a bare inspection of the freighting rates as found in the schedule, which here it is assumed contained only the rail rate, if we may so contradistinguish it, for this is the same thing as when you say that the making of an equal rate on the schedule is conclusive of the right to equal service in all respects. If the rail rate at Ionia and Grand Rapids were as above illustrated, still even though that were the fair and reasonable charge for it, there would be discrimination, mathematically considered, after deducting the cartage at Grand Rapids, because it is the longer haul, for which more should be charged on the rails; or even under the other sections, if the charge there were less than it should be, considering the relative cost. It happens almost factitiously, we might say, that in the schedule rates Grand Rapids and Ionia are exactly equal. And unless there is to be a balancing of cost to the carrier as the test, as above suggested, the terms of the statute are not contravened by the equal rate. If more were charged to Grand Rapids to cover cartage, Ionia could not complain, and if the extra charge be thrown off, Ionia could not object, so long as mathematically there is not more charged

for the shorter haul. We say factitiously, because nothing in the proof shows any reason for this equality unless it is to be inferred, as we think it possibly may be, that Ionia has been given the benefit of a competitive rate at Grand Rapids, a rate less than otherwise it would be if the company might find under the statute authority to make a discrimination in favor of Grand Rapids; and this possibly artificial and gratuitous advantage to Ionia it is now sought to further increase by insist-
135 [13 ing that because the rate is equal, every service in and about the transportation should be kept likewise equal. If this be a proper construction of the statute, then we should say it can only be justly administered by a preliminary inquiry, which shall establish in the findings something more than the naked fact of an equal schedule rate, and we should have information of the precise cost to the carrier of that service which pertains to the movement of the goods upon the rails, and that which is so inseparably attached to it, that it must be paid for in combination with it as a single sum; and then we should have information as to each and every separable service, like cartage, noting any equality of quantity, time, place, and circumstance, that may properly enter into the economic problem of determining the exact amount of the sum to be deducted, if any, for the purpose of equalization. That has not been done in this case.

By the 4th section of the interstate-commerce act (Supplement R. S., 529), it is prohibited to common carriers to charge or receive any greater compensation for a shorter than a longer haul, as therein defined, under substantially similar circumstances and conditions; but in the administration of the act it has been declared to be not always a violation of this prohibition to group the stations of the shorter and the longer haul at an equal rate. (Imperial Coal Co. vs. Pittsburg, etc., R. Co., 2 I. C. C. Rep., 618.) Grand Rapids and Ionia have been thus grouped, and the decision in the court below and before the Commission treated this grouping as a conclusive admission by the railroad company that the transportation from station to station is under substantially similar circumstances and conditions, and because of that admission it necessarily follows that if the rate at Grand Rapids includes a charge for cartage which is not furnished at Ionia as well, the cost of that service being deducted, this section is violated. The grouping which is allowed does not, we conceive, result in such a formidable estoppel as that suggested. It is a question of fact—always a question of fact—whether the circumstances and conditions are substantially similar or dissimilar, and in one of the cases cited it is even said that this is so much the controlling rule of judgment, that argument from authority of precedents seems to be without conclusive force in the exercise of this jurisdiction. (Palmer v. Lond. & S. W. Ry. Co., 1 C. P., 588.) And in another case it is said that "the conclusion is one of fact, to be arrived at looking at the matter broadly and applying common sense to the facts that are proved. I quite agree with Wills, judge, that it is impossible to exercise a jurisdiction, such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances differing in the two cases, you can not say that such a difference of the circumstances is equivalent to such a fraction of a penny difference of the charge in the one case as compared with the other. A much broader view must be taken, and it would be hopeless

to seek to decide a case by the attempted calculation. I should say that the decision must be arrived at broadly and fairly, looking at all the circumstances of the case—that is, looking at all the circumstances which are proper to be looked at—because, of course, the very question in this case is whether particular circumstances ought or ought not to be considered; but taking into view all the circumstances which may be legitimately taken into consideration, then it becomes a mere question of fact." (Phipps v. Lond. & N. W. Ry. Co. (1892), 2 Q. B., 229, 238.) It is true that this was said of the cases arising under the English acts, which have
136 [14 no specific prohibition about the longer and shorter haul, such as is contained in the fourth section of our act; but it was said in discussing sections like our third section against undue preferences and advantages, which were made to serve substantially the same purpose as our 4th section; and the "equality clause" of the English acts has always been held to be as inexorable in its prohibitive force, and therefore as inelastic in statutory construction as our 4th section has been held to be.

If this grouping may be allowed, notwithstanding the prohibitions of the 4th section, as to places where the circumstances and conditions are wholly dissimilar, and upon entirely distinct grounds from any pertaining to essential similarity of all conditions, it can not be that the grouping for an equality of rate is a conclusive admission by the company of a substantial similarity of circumstances and conditions. In the case above cited from the proceedings of the Interstate Commerce Commission, the grouping was not wholly one of stations on the same line, but of many stations on several lines and throughout a wide extent of transportation territory, and it was not allowed because the circumstances and conditions were substantially similar, but because however dissimilar, the uniform rate was not prejudicial, but otherwise; and it is impossible, on the facts of that case, that the circumstances should have been similar. Moreover, the Commission in that case especially approves, in the administration of our act, the legislative declarations of the then recent English act of 1888 on this subject, where the grouping is permitted when the distance shall not be unreasonable and the group rates charged and the places grouped together shall not be such as to create an undue preference; and, furthermore, in its own reasoning about grouping, the Commission says: "It may, however, be lawful, and be supported by just consideration, for carriers to give equal access to markets to localities of dissimilar distances, and it may involve no material difference in the expense to the carrier. * * * In other cases it may be unreasonable, and therefore unlawful, to give equal rates to adversely situated localities where the demand does not exist for a larger supply and where conditions intervene that give an undue preference and advantage to the less favorably situated localities." This is sufficient to show that the grouping and consequential equality of rate, if it implies anything as to the circumstances and conditions, only admits that, however dissimilar these may be, the equal rate is not prejudicial; certainly not to the public, possibly not to the carrier itself. But this is altogether a different thing from saying that it is an admission that the circumstances and conditions affecting the transportation and affecting the cost of it to the carrier and the benefit of it to the public are substantially similar; and it is this inflexible assumption of that fact which has been, by the decision of the

court below and of the Commission, imposed upon the respondent company solely by reason of the grouping, thereby precluding any inquiry, under the 4th section, into any conditions or circumstances that might justify an inequality of rate under that section; for, be it remembered, that although this section authorizes the carrier to apply to the Interstate Commerce Commission for leave to charge a less rate for a longer haul, it does not prohibit a railroad company from charging a less rate for a longer haul if it can justify that rate by showing that the circumstances and conditions are dissimilar whenever it is challenged before the Commission or in the courts. Preliminary permission by the Commission may be necessary to save the cost and expense of such a chal-
137 [15 lenge, but it has not been declared by Congress to be essential to the right to make the rate if the company can justify it—at least not under the circumstances of this case, as we shall presently see. Therefore, if, by the mathematical process to which we have adverted, operating upon the scheduled equality of rate, it should turn out that a less rate has been charged to Grand Rapids than has been charged to Ionia, it does not follow that the railroad company must be prohibited from using it merely because it is less; but it should be prohibited only when it appears that the circumstances and conditions are substantially similar. In our view of that section, the assumption that the company has, by the grouping, admitted a violation of it, is, in our judgment, unsound. We do not say but that, on facts like those we have here, the carrier might be found to have violated the act, but only that the fact of grouping is not of itself conclusive against it of a violation if it should turn out, by mathematical scrutiny, that a lesser rate has been charged for the longer distance. If that fact appear, as it does, on the theory of deducting the cost of the cartage, or by deducting anything whatever from an equal rate, it still remains a question of fact, to be determined on the proof, as to the similarity or dissimilarity of circumstances and conditions in the particular case.

What we have said in reference to the probative value of the circumstance of grouping and its equality of rate in reference to the 4th section applies as well to the second section of the act, when by a like mathematical calculation, deducting the cost of the cartage from the equal rate, there appears to have been an indirect "rebate" or "device" by which a greater or less compensation has been received for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, thereby resulting in an unjust discrimination, as denounced by that section. Likewise it applies to the consideration of the facts in their relation to the third section, which prohibits undue or unreasonable preferences or advantages to particular persons or localities in almost the identical words of the English acts, under which this subject of cartage has been so often considered in the cases we have cited.

Having determined, therefore, that the mere act of grouping and its equal rate is neither in law or fact conclusive against the carrier on the question of substantial similarity or dissimilarity of conditions and circumstances, it is open to the courts to inquire at large into those conditions and circumstances, and say whether or not the company is justified in giving to its customers at Grand Rapids a service for the collection and

delivery of their goods to and from the rails which it does not give to its customers at Ionia, while charging both the same rate of compensation; and in making this inquiry it must be conceded that it proceeds upon precisely the same considerations upon which it would proceed if at Grand Rapids the gross charge for both services were separated, as they should have been, in the published schedules, and that for the accessorial cartage not having been justified it should appear by this separation that a less rate for the carriage proper had been charged at Grand Rapids for the longer haul. We have come to the conclusion that so looking at the facts and circumstances of this case none of the sections of this act have been violated by the fact that the railroad company collects and delivers at the premises of the consignors and consignees at Grand Rapids and does not collect and deliver at the premises of the consignors and consignees at Ionia.

138 [16 The two localities are widely separated in distance and so related to the general trade with which this transportation traffic is concerned, that they are not at all competitors with each other in that trade. It is found as a fact in this case that there is "but slight competition" between them, and we take it for practical purposes that there is none. This extra accessorial service which is rendered at Grand Rapids could not well be an undue and unreasonable advantage or preference of a rival in trade when there is no competition in trade and such rivalry does not in fact exist. Looking at it as a mere contest between "localities," this would seem to be quite important as a condition for the question we have in hand. It may be true that to individuals who pay for the cartage the prime cost of the goods on the premises of a shipper at Ionia would be somewhat larger than the prime cost of the same goods on the premises of a merchant at Grand Rapids who does not pay for his cartage, which would be a disadvantage; but whether an undue and unreasonable one would depend upon the cost of the carriage to the carrier at the two places respectively and the general relation of the carrier to all the traffic that is done at either place. These considerations, however, have been had in Congress and resulted, notwithstanding their force, in favor of the carrier in the prohibition in the 4th section against charging less for the longer than the shorter haul, thus formulating a statutable declaration that such an advantage is unreasonable. If this stood alone and unaffected by other "circumstances and conditions," it would be sufficient to condemn the carrier and compel him to lessen the rate at Ionia, though not necessarily to discontinue the extra service at Grand Rapids or to establish an equivalent service at Ionia.

But it will be observed that the fourth section only denounces a greater compensation "in the aggregate" for the transportation for a shorter than a longer distance, which is explained when we turn to the 6th section, concerning the public inspection of the schedules, where we find, as before pointed out, that the carrier is required to keep separately noted on the schedules the "charges" for the whole service, including "terminal charges," whatever that may mean, and the accessorial services which are noted in the first section; these being included in the description of "rates," "fares," and "charges" all plainly interpreted by the preceding sections, including the first, which must not be overlooked; and it is the aggregate of all these rates, fares, and charges on the schedule which

must not be greater for the shorter than for the longer haul; and the fourth section does not say that the compensation for transportation on the rails proper, that is to say, the "rates" or "fares" exclusive of the "charges" for the accessorial service, shall not be less for the longer haul. The section means, properly construed, as we think, that taking all the rates or fares and charges incidental to the transportation together, these shall not be more for the shorter haul; and since in this case they are precisely the same, the section in its very terms is not violated. Another clause of the section especially enacts that this equality of the "aggregate" compensation shall not be considered as authorized or sanctioned by the previous language of the section, but is careful not to prohibit it, which means that it may be equal for the longer and the shorter haul only when the circumstances and conditions justify; and in this case it has been sanctioned by the permissive grouping which has taken place.

There is no doubt that it must be equal in fact as well as in
139 [17 form, but when it appears to be equal in form it will be taken to be so in fact until it is shown to be colorable and unlawful by him who challenges it. There seems to be a kind of statutory dispensation for an equal rate as against the outlawed less rate for the longer haul, but, after all, in legal effect either can be justified only by the same facts, and there is no difference except that, the one being naturally more tolerable than the other, Congress was influenced, out of abundant caution, to insert the peculiar clause to which we refer. Therefore we think that the 4th section does not conclusively appear to have been violated when the railroad company has charged an aggregate compensation for all its services of transportation at Grand Rapids which is just equal to and not less than the aggregate compensation for all its services of transportation at Ionia, merely because the items going to make up the aggregate are not the same at each station or the equivalent of each other. But when the statutory propriety of this equality is challenged, as it has been done here, it is the duty of the railroad company to justify it under this 4th section, and we do not wish to be misunderstood as holding that it is lawful to charge an equal rate in the aggregate if upon scrutiny of the items going to make up the whole charge it shall appear that as to some of them there is such an inequality of advantage and benefit that, not being justified by the circumstances and conditions, it constitutes in fact an evasion of this definite prohibition of the 4th section. What we do say is, that this disadvantage to the Ionia shipper to which we have called attention is not unlawful when it arises by reason of an item of the charge contained in the aggregate of compensation, which, although different, is under the circumstances and conditions reasonable for the carrier to make in the due course of his business at that place. The items of cost for which the aggregate charge is made at either place need not be the same and rarely would be, we should think, and this balancing of the items in the bill of particulars to find a difference in the rate is outside of the scope of the statute, unless it be in itself a process necessary to prevent some evasion of the law established by the facts.

And this brings us to the consideration of the circumstances and conditions at Grand Rapids which concerned this carrier's mode of collecting and delivering the goods for its customers at that place. A minor "condition," which is analogous in its operation to that which we have before

mentioned of a want of competing trade between the two localities, is the difference between them in regard to the extent of population to be served and the amount of the traffic in tons that is done at each place respectively; the one being a city of 70,000 inhabitants and the other of only 6,000; the one having a traffic of nearly a million of tons and the other of but 55,000 tons. It is entirely true that it would defeat the purpose of this act to hold that discrimination could be made against a shipper or a locality merely because it is smaller than another; but when we come to consider whether or not in the "aggregate" compensation received from either the particulars of the service going to make up an equal charge to each are the equivalent in value of each other and for want of that equivalency to pronounce it an unjust discrimination, it is not improper, we think, if the question shall turn upon the nature and character of that accessorial service we have heretofore described, whether it be one of "terminal facilities" strictly speaking or not, to look to the population and the traffic at each place to see if the facilities used for collecting and delivering the goods to the customers relatively and comparitively, are unreasonable, unequal, and discriminating.

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We can not say that a railroad company exercising that freedom in the conduct of its own business which is still left to it, notwithstanding the regulations of the interstate-commerce act, may not reasonably and without undue preference or advantage and without unlawful discrimination, collect and deliver at its own expense goods at one locality and not at another where there is such a dissimilarity of population and traffic tonnage as we have here, so long as its aggregate compensation for the whole service is not greater for the shorter than the longer haul, but is exactly equal.

But the leading, most important, and controlling feature of the situation at Grand Rapids, as shown by the proof, is the fact that the railroad company terminates its rails at a point relatively far distant from the business sections of the city. This condition was first established twenty-five years ago for reasons that do not clearly appear from the proof, but which may be inferred to be largely those arising out of considerations of economy, and it is altogether probable that traffic relations with the Grand Trunk system breeding a desire to adopt the English habit of collecting and delivering goods by its own cartage may have also largely influenced this location, and ever since that time it has continued to so collect and deliver its goods. There can be no denial of the suggestion that has been made, that one of the purposes of the interstate-commerce act was to break up unjust discriminations that had become hoary with age, and the long existence of an abuse can in no sense excuse its indulgence or arrest the operations of this act. Nevertheless, it must first be established as an abuse before the act can extirpate it, and being one of the established customs of this railroad and a well-known appliance used in its business, the very fact of its long existence is still a circumstance or condition to be considered in determining whether or not it is a violation of the act to keep it up at this place and not to establish it at other places where the appliance has not heretofore been used. Taking the interests of the public at Grand Rapids and looking at it as an established and familiar business convenience and a habit to which they have long been accustomed, it becomes manifest that the carrier could not abandon it vol-

untarily or by coercion without creating that dissatisfaction and prejudice against itself which would have a natural tendency to drive away its customers and lessen its revenues, and being of that separable character and outside transaction which we have shown it be, it may well be doubted if Congress had any intention—if it had the power—to deprive a carrier of such an appliance by imposing upon it the necessity of either abandoning it or the establishment of similar appliances at all other places on its road; for it comes to this, that if this company must afford cartage facilities to its customers at Ionia, it must do so at all other stations. If Congress had knowledge, as we must presume it had, of the existence of such an instrumentality among the appliances of railroad companies, any intention to discontinue it should be made manifest by more direct language than we have in this act, and not dependent solely on implications to be drawn from it. While no railroad company should be allowed to use any of its appliances for the purpose of making unjust discriminations or undue preferences in evasion of an act designed to secure just and fair dealing, the long-continued existence of such a custom as we have here may well be regarded as one of the "circumstances," if not "conditions," mentioned everywhere in the act as elements
141 [19 which are to enter into the decision of the question of unjust and unfair discrimination, and it may well be argued that it is unjust and unfair to the people at Grand Rapids to deprive them in the name of the qualified equality which the act establishes of this long-used custom of convenience. Our law affords abundant instances of its tender regard of the established customs of the people. We think that the consequences of the deprivation to the people of Grand Rapids of this custom may be held to be one of the circumstances which may relieve a carrier from the statutory obligation of equal facilities elsewhere, to say nothing of injury to itself. There having been no such long-established custom at Ionia, and their station having been located much nearer to the business portion of the town than at Grand Rapids, exhibits a dissimilarity of circumstances between the two places.

Another condition or circumstance is, that having so long ago adopted this plan of accessorial service and adjusted its terminal facilities at Grand Rapids to that plan, to now abandon it and in lieu thereof project its lines of rails and new station appliances into the traffic centers of the city would entail upon the carrier an enormous cost for rights of way and other necessaries of construction and reconstruction. The city having so largely increased in population since the station house was first located and the cartage plan was first established, and the cost of railroad building having so immensely advanced, especially in that which is imposed by the greed of municipal authorities having control of the streets and public ways of a large city, or of the private owners of city property, upon a company seeking under constraint to purchase the rights of way, there is scarcely any probable estimate of the cost, short of an actual survey, too large to imagine as a loss which would be incurred in offering to the people of Grand Rapids facilities equivalent in convenience and attractiveness to that which they would lose if the company were compelled by law to give up the cartage now in use. There is no situation like this at Ionia. While we have no doubt of the ample power of Congress to regulate interstate commerce, a doubt may be suggested if even by more direct

legislation than that which we have here it would have a constitutional sanction for an act which, under the disguise of "regulation," would thus impose upon a railway company such burdens as this without making compensation in the interest of the public which was to be benefitted thereby. The ordinary or inviolable freedom of the use of its property which this company enjoys, and which can not be taken from it except by due process of law and upon full compensation, might be affected by such legislation.

Finally, we have a circumstance, not more important than those to which we have adverted but more striking in its appearance of importance, and that is the competition of rival carriers at Grand Rapids for the same traffic. It needs nothing more than the mere suggestion of the facts themselves to display the disadvantage there would be to this company if it remained with its station houses in the suburbs of Grand Rapids without the privilege of collecting and delivering by carts, while its rivals had station houses located immediately in the business center of the city. It does not then become a matter of competition and business rivalry, but substantially of the annihilation of the business of this company at that point. Or, more intolerably, a denial to this company of the right to compete with its rivals as now it may. Its only possible remedy
142 [20 would be the building of its tracks into the city at the cost we have suggested. There is no such condition or circumstance as this at Ionia. There is there no rival line of railway to compete with this carrier for the traffic that is to be carried, yet this is not the effective dissimilarity of these conditions and circumstances; that arises more directly out of the fact that the shippers at Ionia are as close to their station house on this carrier's line as the shippers at Grand Rapids are to the lines of this carrier's rivals there; and this carrier is so much farther away from the premises of the shippers at Grand Rapids, that it can not reach its station house as readily as the shippers at Ionia can, or as readily as its rivals can reach the same shippers at Grand Rapids. It is the circumstance of greater distance, not measured by the cost of cartage as between the shorter and longer distance, but measured by the enormous cost there would be to this carrier to put its station house as close to its customers at Grand Rapids as its station house at Ionia is to its shippers there and as close as those of its rivals. In other words, this carrier has so favorably located its station house at Ionia that it is as close to the shippers there as any station house of its rivals at Grand Rapids is to the shippers at that place, and Ionia merchants, being in shortness of cartage distance as close to its station house as the most favorably situated shippers at Grand Rapids to any railway station available to them, should not complain, since they have each quite equal facilities to railway stations, from which their goods may go or come in the general traffic eastward. But this carrier, being at Grand Rapids farther away from all shippers there than it is from those at Ionia, can not reduce this distance to equal advantage for both places without the enormous cost to which we have referred. It is therefore apparent from the proof that it is cheaper for the respondent to collect and deliver its goods at Grand Rapids by carts than to put itself nearer the premises of the shippers at that place, and thereby make cartage as insignificant or cheap or as nearly so as at Ionia, or rather as little obstructive to the object of getting business as at Ionia.

The dissimilarity between the two is that this particular carrier is farther away from Grand Rapids than Ionia, not in the sense of simple distance, but in that of the cost of getting nearer. Wherefore the identity of cartage cost per hundredweight mentioned in the proof is not the essence of this situation, but the cost of substitution. If it were a mere question of miles or quarters of a mile, this dissimilarity would not be so important; but when we take into consideration the cost of other methods of accessorial service to this company at Grand Rapids, the dissimilarity becomes at once formidable, and, standing by itself, would possibly be enough to control the decision in this case.

Now, then, the only effect of the fact of competition in such a state of things as that we have at Grand Rapids is, that this carrier loses the traffic entirely, not because it can not make, under the statute, a lesser rate to shippers on its lines than at Ionia, the shorter haul, but because it can not afford them equal facilities of access. The statute can not be violated merely to get traffic from a rival by giving lesser rates than to people more favorably situated; can not bleed Ionia to make up for the misfortunes of competition at Grand Rapids, for Congress has prohibited such a practice; but it has not prohibited the carrier from resorting to a cheaper method of securing access at Grand Rapids than one more costly. It has not prohibited this company from entering into competition with its rivals by some mode of access to shippers at Grand Rapids; and why
143 [21 not this mode? It has not been prohibited from extending its lines and placing its station houses alongside of those of its rivals; and why should it be prohibited from sending its carts there? It has not, we think, and these prohibitions of the statute should not be allowed to so operate by mere construction of words. It is quite the same thing as if this carrier should stop many miles away from Grand Rapids and be unable to enter there unless it could form a connection with some outside agency which would undertake to bring to its lines the traffic at Grand Rapids and carry from its lines the traffic to the shippers at that place. Could it be said in such a state of circumstances that this carrier should not make a contract to pay for such a service out of its revenues without being amenable to the restrictions and penalties of this act if it should turn out that the rates were unequal between Grand Rapids and Ionia, as it now appears, by the mathematical calculations that have been made? We do not overlook the fact that the act applies to continuous lines connecting with each other. That is not the situation we suggest, but it is that of a carrier so separated—from whatever cause—from the shippers at a town that it can not reach them except through the employment of a separate and distinct and outside accessorial service that does not form, in the contemplation of the act, a "continuous line" of transportation to the premises of the shipper. Congress was not contemplating that kind of a continuous line, but one from market to market, city to city, or station to station. Let us take an extreme case and imagine this railroad company's lines terminating at Ionia, that a transfer company should agree with it to carry with carts to the station house at Ionia goods destined to and from Grand Rapids, and that in order to secure this traffic the carrier should agree to pay for the service of the transfer company, charging no more but exactly the same to the people at Grand Rapids that they charged to the shippers at Ionia.

Could it be said that the shippers of Ionia could complain of this arrangement as being a discrimination under any of the sections of this act? We think not; and we do not see the difference between the arrangement just suggested and that which actually appears in this case, except the longer distance to be traversed in the accessorial service. It might be so long as to fairly come within the statutory meaning of a continuous line and be a single transportation, subject to the long and short haul rule and all that, but it would be a condition so dissimilar from that pertaining to the shippers at Ionia that it might be held to justify a lesser, to say nothing of an equal rate, and unobjectionable under the statute; and if the volume of traffic would compensate the carrier and be an object worth attaining in its own interest and that of the public at Grand Rapids, it would be commendable, as well as fair and just. Ionia could have no claim to break it up worthy of attention, especially if it had no business rivalry with Grand Rapids.

The whole of these dissimilarities of condition and circumstance as between Grand Rapids and Ionia, whether of competition or what not, may in our view be summed up in the statement that this particular carrier can not have access to the traffic at Grand Rapids without this cartage service that is complained of by Ionia, while at that station it can have access to the relatively insignificant traffic there given to the carrier without it. But for the rival lines at Grand Rapids the carrier might force the expense of the inconvenience of the location of the station house on shippers there just as in thousands of localities it is enforced on shippers who must cart their goods sometimes ten or twenty
144 [22 miles, or even more in some places, to reach the nearest railway station; but in this instance, because of these nearer tracks, the shippers can not be forced to incur this expense, and this condition or circumstance compels the carrier to supply the access which it does supply as cheaply to itself as possible; and any interpretation which prohibits it from doing this in the cheapest way is an unjust discrimination in the "regulation of commerce" against this particular carrier, if not unlawful, and can not be any less unjust and unlawful than it would be if the prohibition extended to an injunction forbidding the carrier to build its lines and station houses as close to the shippers at Grand Rapids as those of its rivals. If it did this, confessedly it might, by grouping, charge an equal rate with Ionia, although that is the shorter haul and would by such extension be still shorter. Hence we do not see why they may not just as lawfully charge an equal rate if the access at Grand Rapids be had by carts rather than by extended lines of rails. Surely if the rails were extended and an equal rate were charged, Ionia could not demand that a mathematical calculation should be had of the exact cost of the new access and an aliquot part of the equal rate be deducted in order to make a showing of the larger charge for the shorter haul. What Ionia really demands is that she shall be allowed to impose an additional burden upon the carrier by taking advantage of appearances in this matter which ignore the inconvenient and distressful location of its station house at Grand Rapids, while its own station house is as conveniently located in that respect as any station house could well be. There is no reason why the defendant company should be thus forced to build its lines into the city to secure its railway traffic.

In reply to the argument that there must be some limitation upon the distance from the shippers to the station house for which this accessorial service would be permissible or else the same benefit could be claimed for any shorter distance than that which exists in this case, it would seem sufficient to say that if this carrier's lines were projected into the city of Grand Rapids and its station houses located adjacent to those of its rivals, so that there would be literally no difference of convenience to the shippers, the additional accessorial cartage would then be on the face of it an unjustifiable discriminating benefit, which would also be apparent if the new station house were located relatively with the same advantage that the other station houses are located; and, to put it more directly, if the station houses at Grand Rapids should then be relatively as convenient to the defendant company's customers as the station house at Ionia, which is possibly the legal test. No matter what the distance, great or small, if the peculiar conditions be such that the carrier can not, except at great cost, have access to the traffic without some supplemental agency, the dissimilarity would exist. For example, suppose that through some favoritism a railway carrier should be denied access to the wharfs on a waterway from and to which the traffic of that waterway was delivered, and that by the establishment of accessorial cartage to and from the wharf the railway could share in the traffic with rivals who were favored with a more direct access, the condition would then be analogous to that we have here, although the cartage might be for only a few hundred feet. Or, suppose even that there were no circumstance of rivalry in the condition, but that at one station situated on a waterway this denial of access should exist while at another station remote from the waterway no such access were needed. Now, if to get the traffic conveniently from the waterway the railway company should establish an accessorial
145 [23 cartage service, and, grouping as it may with the remoter station, would charge an equal rate for the whole service, including collection and delivery at the water side, then surely there would be in such a condition a dissimilarity to that at the remoter station which would justify the equal rate without incurring the denunciation of the statute. Everything here depends upon a fair, reasonable, and just consideration of the particular facts and circumstances of each and every case, and in the nature of it there is an impossibility to prescribe any general rule of law to govern it, because it is not a question of law but a question of fact.

No case has been cited on either side precisely like this, and it belongs particularly to that peculiar class of cases as to which it has been said by the English courts that the argument from authority seems to be without any conclusive force, because it is so distinctly a question of fact. In the case of Parker v. Great W. Ry. Co., supra, Coleridge, J., in delivering judgment, treats a case quite analogous to this, if the marked distinction be noted that it was a controversy between the carrier and the complainant about alleged preferences against him and in favor of itself qua carrier and its carrier's agents doing the carting for the railway qua carrier, while the complainant did his own carting, the charge being in that case for precisely similar services from and to the same place. It was not, as here, a controversy between widely separated localities, but between persons doing business at the same place and over the same route. In the eighth and last branch of the case which he considered there was paid

by the company to contract carter's or carrier's agents one shilling and sixpence more to cover the cartage service than was collected from the shippers employing the railway company itself as their carrier, and whose goods were thus carted for them by the railway company. The plaintiff, an outside carrier over the line in competition with the railway company qua carrier, did his own carting and sued to recover back this extra shilling and sixpence per ton upon precisely the same theory of mathematical deduction from the station to station rate that was adopted in this case. It was held that because the charter of the railway company authorized it to make separate arrangements for the accessorial facilities, very much as the Michigan statute does in this case, and protected the public against inequalities and discriminations in that accessorial service by a special tribunal, performing as to them the same functions belonging to our Interstate Commerce Commission, pro hac, the question of unlawful discrimination in the accessorial service was to be treated separately and on its own facts or merits, so to speak, and should not be confused with the station to station charges and with that other equality as to the latter, which was protected by another section of the railway charter; and that the plaintiff could only complain if the company should refuse to carry his goods in its carts for the same rate of carriage that it carried his rivals' goods in its carts. He was not to have it deducted from the station to station rate in order to make him equal by that process.

Of course, in the consideration of that equality between "localities," which is secured by our act and now by the most recent act in England, there is a wide difference in the application of the rule of the case just cited. It possibly would be inadmissible to say that this act could not be violated by the railway company except by a refusal to do an already established carting for the shippers at Ionia on the same terms
146 [24 upon which it does the carting for the people at Grand Rapids; but the application is found in the fact that we have here, as there, in the Michigan act a special authority authorizing this company to establish the accessorial service, if such legislative authority be needed; and here the powers of the Interstate Commerce Commission to deal especially and separately with the accessorial service are as ample as were those of the special English tribunal; and according to the ruling in that case the accessorial service here should be separately and independently treated, as it was there; and then, mutatis mutandis, it comes to a plain statement of the question whether or not under our act this railroad company is bound to establish a cartage service at each and every other station, when at Station A its shippers have had their goods collected and delivered on their premises by the railway company? Shall it be compelled at every locality or station to collect and deliver on the premises of the shipper because it does at one? And that is the real question in this case. It may be that it is a proper construction of the act to compel the company to do this, but if so, it must be done upon the theory that equality of accessorial facilities means an equality not between shippers using the same facilities, but an equality of facilities at each and every station, and not, we conceive, upon any theory of securing that equality by a mathematical readjustment of the rail rates from station to station. And, seemingly, the peremptory order of the Commission to abolish the cartage at Grand Rapids adopts that view; but if so, the mathematical calculation was wholly irrelevant.

In another but earlier case between the same parties, supra, there was a controversy over the accessorial service, which the plaintiff did for himself, he having to pay the full charges made to other shippers for whom the company did the selfsame service between different stations or pairs of stations, and he sought to recover as for excessive charges that which was paid for cartage by others to the company. It was held that a shipper could not be compelled by the company to accept the accessorial service which it supplied, but should have the privilege of doing it for himself, and that the cost of it should be deducted from the full charges made to other shippers for whom the service was performed. There it was again a struggle between two rival carriers over the same line between the same pairs of stations for charges covering precisely the same services; as if, in this case, a shipper at Grand Rapids should choose to do his own cartage, he might compel the company to deduct its cost from their full rate, in which it was included, if it were so included as a fact. The main fact found in that case was that the service at the several stations actually performed by the company was the very same service for which it refused to make the shipper doing it for himself any allowance for its cost, no reason whatever being given for the discrimination. Obviously this deduction of the cost of the cartage well illustrates when that reduction may be required. Just as obviously the circumstances here are different—we mean in their application to the common principle applied in both, by the court there and by the Commission and the court below here. Unless we assume, as was assumed in this case, the exact equivalency of cost to the carrier of the carriage on the rails, "dehors" the accessorial service, the deduction can not be made under any of these English cases. Now, it is true that where the whole service, and all its parts, whether main or accessorial, is precisely the same to each
147 [25 of the contending shippers, the schedule charges of the company may be fairly inferred to represent that equivalent cost; but it is otherwise where the service or any of its parts is different as between the two contending shippers, and where the only fact from which the equivalency of service may be implied is that of an equal rate for both on the schedule of charges, which fact is here explained to come not from identity of parts or equivalency of service in every part, but only from a permissible grouping of the two, notwithstanding the literal prohibitions of the act of Congress. There appeared in that case not alone the one fact of an equal rate, but others aliunde, from which was established the foundation fact, that of an exactly equal service in all its parts, namely; here the service is not otherwise shown to be equal, but is claimed to be so solely because of the equal rate taken alone. We have already held in this case that the grouping rate did not imply equivalency of the circumstances and conditions mentioned in the statute, nor is this necessary equivalency of cost to the carrier to be so implied, on the facts of this case, from the circumstance of an equal rate arising only out of the grouping on the schedules. The admission imposed upon the company in that behalf was called an admission of similarity of condition and circumstance, but if this did not mean an equivalency of cost of strictly rail carriage, it could afford no foundation for the reduction of cartage under any case we have examined. Always the minuend of the arithmetical process of subtraction is the equivalent cost of each carriage

to the carrier and the subtrahend the cost to the carrier of the equivalent accessorial service which has been done by the shipper himself, but charged by the carrier as if done by him. Here it was found as a fact that the rate or cost at Ionia and Grand Rapids was the same, but it did not thereby sufficiently appear in our judgment that cost of carriage to the carrier was the same, and therefore the mathematical process was inapplicable, treated strictly on its own merits.

But we place our judgment upon the broader ground that in a case like this it does not apply because of dissimilarity of circumstances and conditions attending the accessorial service at Grand Rapids and Ionia respectively. These two instances we have cited are sufficient to illustrate the authority of adjudicated cases for the deduction of cartage from rail rates between the stations. In the Baxendale and Garton cases, supra, the deduction of cartage and other analogous service was gone over in different phases of the question and the result of previous decisions was stated by Cockburn, C. J., thus:

"That principle is, that a railway company has no right to impose a charge for the conveyance of goods to and from the station where the customer does not require such service to be performed by the company."

And where it is a dispute about substantially the same service for each shipper there can be no doubt of the application of that principle, but it requires different treatment upon broader grounds when it is brought in to determine a dispute between two localities qua localities and not as classes of shippers having substantially the same service performed under the same circumstances and conditions; and, as we have endeavored to show, the bearing of the same or equivalent conditions and circumstances is not always the same as to each of these categories. That pertaining to different stations usually turns not so much upon rates of freight charges as upon a difference in uses of the facilities furnished
148 [26 or withheld at the several stations, of which Ayers v. Chicago & C. R. R., 71 Wis., 372, where a discrimination as to the use of live-stock cars was complained of, is a convenient illustration. (Hutch. Carr., sec. 291 et seq.)

And this case, in our judgment, belongs rather to that category, and must be so examined as to the bearing of the circumstances and conditions in their similarity or dissimilarity under the interstate commerce act, than to the other category of a differential freight rate to which it has been confined by the Interstate Commerce Commission—the complainant in the case—and the court below.

Take the condition or circumstance of competition, for example. That circumstance might be more effective to justify a discrimination as between two disputing localities like Grand Rapids and Ionia as they present themselves in this record than as between two shippers or classes of shippers, themselves engaged in the rivalry of competition in their lines of business either at the same place and where the general service for each was the same, as in Eversheds case, supra, which has been relied on in favor of Ionia, or as shippers at different places, but competing with each other in the same markets, as appears in other cases. That case went through all the courts, including the House of Lords, and is a leading case on the subject, belonging, we repeat, to the class of adjudications about discrimination in rates, and not facilities, wherein the injury

to the shipper in the particular case who was paying more money than his rival for the same service was the cause of complaint; and if he directly pays it, he may recover it back on the common counts in assumpsit. (Hutch. Carr., sec. 301 et seq.)

The traffic acts in England and here have enlarged the remedy and afford additional redress, or where the action of assumpsit to recover back unlawful charges would not apply, but still the tests, in the absence of specific statutory tests, like the longer and shorter haul, are yet quite the same, at least in their judicatory value. Apparently there may be a discrimination in rates, when truly there is only a fairly justified difference in "facilities" which produces this appearance of a difference in rates; but this is only another mode of saying that the conditions and circumstances are dissimilar, which being recognized by the statute as a necessary discrimination, it can not therefor be unlawful. Let us imagine a narrow gauge road competing at Grand Rapids with a broad-gauge road and making an equal rate with it; but in order to use its diminished cars it becomes necessary to repack or transfer the goods from connecting cars to its own. Could it be said to violate this act if at Grand Rapids it paid for the repacking or the transfer, and, there being no other than the narrow gauge at Ionia, it charged there a full rate? Should it be compelled at Ionia to lessen the rate by so much as the repacking cost, or the cost of transfer, on the theory that this cost being deducted made a rate less for the longer than the shorter haul, or was a "rebate" in effect, or an "undue advantage?" There would be a physical condition in the matter of the competition as potential in its dissimilarity as a water competition or that of a railroad not under the control of the Interstate Commerce Commission, which is recognized as a dissimilarity justifying discriminating rates (R. R. Com. v. Clyde Steamship Co., 5 Int. St. C. C. R., 327); but none the more potential than we have in this case, where the physical remoteness of the station house can not be overcome except at great cost. Moreover, it is just as much out of the power of the Interstate Commerce Commission to correct that physical
149 [27 condition by any order it could lawfully make as in the case of water competition. It can neither change the gauge of the road nor lessen the remote distance of the station house, nor yet compel the rival road to charge a larger rate to cover the difference. It might, forsooth, preliminarily authorize the narrow-gauge road or that with the far-away station house to charge a lesser rate than that for Ionia—the shorter haul—which would be ineffective, however, as a remedy, because there is no competition of any kind between Ionia and Grand Rapids, and that station is not involved in this problem of competition of rival carriers at Grand Rapids in any such sense as this we are considering; or authorize it to charge a lesser rate than the rival carriers, which needs no sanction of the Commission, we take it. But that remedy is as useless as the other, since the rival carriers would come down with their rates, and there is the same trouble as before. What could the Commission do? Its control over rates is not such as to compel the rival roads to maintain a fixed difference always operating to overcome the misfortune of their unfortunate rival, and it can not invade the rights of property and command by mandatory injunction of the courts or otherwise the change of the physical dissimilarity which stands in the way, inexorably.

We again say that a doubt may be suggested whether Congress has the power in "regulating interstate commerce" to do a thing like that which was done by the Commission in this case, whatever benefits to the public may be desired from equality of treatment, of service, and facilities. We must take the railroad properties as they are, with all the limitations that smallness of means may impose; and whenever the proposed "regulation" departs from the business of "regulating" the facilities and operations of carriers as they actually exist and enters into the domain of deprivation, construction, and reconstruction of properties to carry out the proposed "regulation," it is time to pause and at least consider the effect of such a process upon the rights of property. We do not find it necessary to base our decision upon such a consideration in this case, for we repeat that this regulation of the accessorial service facilities which the act has undertaken must be, upon a proper construction of the act itself, confined to the existing state of things in regard to the use of its property by each and every carrier; and the powers conferred upon the Commission and the courts must be restricted within the boundaries of "regulation," and not invade the rights of property. As was well said by Creswell, J., in In re Catherham Ry. Co., 1 C. B. N. S., 410, 419: "By the act of Parliament in question very extensive powers are conferred on this court—powers which may be exercised for the benefit of the public, but which may also be exercised to the great detriment of those who are engaged in carrying on railway concerns—and therefore the courts should be very cautious before they set on foot an inquiry to ascertain that there is reasonable ground for believing that the provisions of the act have been infringed."

And if we find that the order of the Commission to discontinue the cartage at Grand Rapids operates to deprive the carrier of his business at that place, it can not, in the language of the act, be a "lawful order" or "requirement" which the power of the courts can be invoked to enforce under the 16th section. Separated and distinct as it is, this accessorial service at Grand Rapids and the use of it is a right of property of this carrier, and an order of the Commission depriving the company of it and forbidding its use is not authorized by the act, whatever power
150 [28 the Commission may have over it to prevent inequality of rates as between Grand Rapids and Ionia, where that inequality arises out of the improper use of this bit of its property by the carrier, if a case should present itself where shippers at Ionia and Grand Rapids would be in competition with each other in the markets reached by them jointly in such a sense that the rates of freight, so discriminated, would give the one the advantage over the other in their rivalries in trade; which is not the case here, as shown by the special findings of that fact. In the Eversheds Case, in order to justify the discrimination in rates, there was a struggle to establish the same inexorable necessity arising out of the physical condition that we have intimated here, but it did not avail, for the reason that it did not exist. Here, every shipper who lives at Grand Rapids, with the possible exception of any who live adjacent to the ill-located station house, is affected by that distance in its relation to the distance from the station house of the rival carriers; there it was only two or three shippers who were favorably situated in having spur-track connections with a rival line. The loss here is of the entire traffic of a

city; there, the defendant company would only lose that of two or three favorably located brewers, which is almost de minimis in comparison with this; but the *the* great difference is that there it was a discrimination between rival shippers in the same trade at the same place, sending to the same market, and for whom the same service was done, while here the complainant is a locality—for that is the real nature of it—widely separated from that at which the alleged discriminating outside service takes place and with which the complaining locality has no connection, there not being the least trade rivalry between the two. There also, there was not only an allowance for cartage, but a direct rebate of the station-to-station rate, while here the schedule rate is the same, and the only difference is as to the independent cartage service, made necessary by a condition of things which does not exist at Ionia. The judgment of Bramwell, J., in the court of appeals, states the grounds clearly. After recognizing that larger quantities of goods is a justifying circumstance, which, by the way, we have very strikingly in this case, he says: "It is also urged that the three firms had something in the nature of a natural advantage to the benefit of which they were entitled in their dealings with the defendant. I am of opinion that is not so. They have indeed an advantage which enables them to put a pressure on the defendants, but if the defendants yield to it they must give an equal advantage to the plaintiff. If the three firms were a mile nearer than the plaintiff to the defendant's station, doubtless the defendants might charge the plaintiff a larger sum for carriage. But the one advantage here that the three firms have is that they have easy access to another railway. So they might have to a canal or an ordinary highway. But these considerations, though a reason for the diminished charge, do not justify the extra charge to the plaintiff." And Britt, J., adverting to the sidings connecting with the rival line, says this: "Now, it seems to me that the plaintiff and the three firms of brewers in their relations with the defendants were under the same circumstances in every material respect. The defendants did the same thing for both the plaintiff and the three firms of brewers; in each case they collected and carted the beer through the town, they took it to their station, they then put the beer into similar trains and conveyed it over the same lines of rails, and, as may be assumed for the purpose of this discussion, the quantity carried for the plaintiff and the three firms was the same, and between
151 [29 what the defendants did for the plaintiff and what they did for the three firms no difference exists; but the charges which they made to the three firms in respect of the same services were different." In the House of Lords it was said by Lord Blackburn that: "It may well be that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a small quantity; that would be a difference of circumstance. And many other cases may be pointed out in which the circumstances would not be the same." He then rules that what is necessarily done merely to "coax" traffic from a rival carrier is not a differential circumstance under the English act.

Now, mutatis mutandis, Ionia as a station has its station house as near its traffic by rail as any railway station house at Grand Rapids to which the shippers do their own carting, but unfortunately the defendant com-

pany has its station house relatively to all the rest—that at Ionia as well as others—more than four times the distance, and it offers the carting to overcome this physical disadvantage, not to one shipper only, but to all, coming precisely within the general rule stated by Bramwell, J.: "It is open to a railway company to make a bargain with a person, provided they are willing to make the same bargain with any other, though that other may not be in a situation to make it. An obvious illustration may be found in season tickets. A man is taken a daily journey for 1s. for which his neighbor, who takes it once a month, pays 5s. He is entitled to the same benefit, but it is one he can not avail himself. So as to goods. If a million tons are carried for 'A' at a certain price, 'B' may demand the same rate for the same quantity, though he never will or can, because his dealings are too small." Here, if this rule applies as to a claim by one station for equal accessorial facilities, the most favorable application of it in behalf of Ionia would be that if the railroad station of the defendant company at that place were a mile and one-quarter distant from the business center or sections of the town, as at Grand Rapids, it should have cartage service at the same price, although it might be that there were no pressure on defendant to furnish it through rival lines bidding for its traffic, the more unfavorable application of it being that to entitle it to cartage it must also have as large a quantity of goods. We have given so much attention to this Evershed case because it has been misapplied, as we think, in support of the contention of Ionia here, the conditions and circumstances being too wide apart in their application, even as analogies, to the two cases, respectively. But the subsequent cases above cited show that the Evershed case has been very much restricted, as we restrict it here, if not overruled. So far as it is any authority for the notion that the competition of rival lines is not a circumstance to be considered in determining the question of undue preference, we have the court of appeals in the Phipps Case, supra, saying that "its authority upon this point is gone," it having been otherwise ruled in the House of Lords in the Denaby Main Colliery Case, supra. And there is not any doubt that whatever may have been thought heretofore on the point in England, now the competition of rival lines is one of the circumstances that must be considered, not as controlling, but as an element, along with others, to justify the discrimination of which complaint is made.

In the case of Lancashire, etc., R. R. Co. v. Greenwood, 21 152 [30 Q. B. D., 215 (A. D. 1888)], while stating what should influence the action of the railway commission in its inquiry, just such an inquiry as we are making here in determining whether that which our Interstate Commerce Commission did shall receive the approval of the courts as a proper order to be made, Cave, J., says: "Obviously the considerations would be of a somewhat intricate nature. It would be necessary to inquire what were the reasons why more was charged for one distance than was charged for another distance, or why proportionately more was charged for one distance than another, and that would depend upon a great many considerations arising out of the nature of the traffic, the peculiar facilities, the competition which might be developed, and a great many other matters which, quite obviously, were unfit to be tried before a jury," etc. And in one of the very latest cases, that of the

Liverpool Corn Trade Association, supra, before the English commission itself, in treating of the most recent English act, now extending in terms the jurisdiction to controversies between "localities" about unjust discriminations, as our act does, and lamenting that the legislature had not undertaken to prescribe the regulations it has left to the commission and the courts to decide, it is pointed out that not only the interest of the public—parenthetically we suggest the public at Grand Rapids as well as that at Ionia—but "the commercial interests and necessities of the railway companies," are to be considered in fixing charges. Wills, J., in leading up to the conflicting authorities on the more or less potential effect of competition upon the question of undue preference, and reaching the conclusion that it is not to be excluded, but that the "legitimate interests of the railway company" are also to be considered, asks this question: "What are the circumstances under which it would be natural, after taking other legitimate considerations into account, to ask oneself—first, Does the public interest require the maintenance of the lower charge? and, secondly, Can the higher charges be reduced without an unfair interference with the interest of the company? Obviously, if upon other grounds, the court sees there is no undue preference, these questions become immaterial. But, if upon general grounds and without regard to these considerations, a case of undue preference has been established, the natural consequence would be to order the company to desist from the preference. No order could be made as to how the inequality should be redressed, and the choice between the different ways must always be left to the company. They would be obliged, however, either to level up or level down, or to do both. But suppose they can satisfy the court that to level up would destroy a traffic which in the public interest ought to be secured, and that to level down would be to effect an undue reduction (whatever that may mean), it follows that for different reasons neither the one method of redressing the inequality nor the other, nor a combination of the two, ought to be adopted, and that, therefore, the order ought not to be made. In other words, the state of things which creates the preference is justified, and the preference ceases to be undue within the meaning of the legislation." He was dealing with an English act which, unlike ours, was prescribing a vague statutory rule, ours leaving the question open; but it is worthy of remark that he was combating the argument of the Attorney-General that the English act had prescribed the public interest as the sole or only rule of decision. Parliament in its omnipotence might do that, possibly, or within any degree, but we suggest that our Congress might find constitutional obstructions
153 [31 to the enactment of any rule which destroyed the carrier's interest as one of the considerations to be used in judgment—it can not sacrifice the company's property or rights to the public interest, but can only regulate the business in the interest of both.

We are not unmindful of the danger to which the Commission calls attention in one of its cases (the Clyde Steamship Case, supra), of overlooking dissimilarities of legislation, methods of trade and transportation, and the like, in dealing with English precedents, and we have tried to avoid it here; but after all our act is founded on an experience in the mother country commencing this kind of legislation cotemporaneously with the birth of railroad transportation and extending in its common

and statute law to all classes of carriers; the general purpose of both is the same, and the rules of administration there and here should be divorced, as they clearly have been by the courts, from any rigid adherence to mere technical precedents and authority, of which the subject is in its nature quite incapable, and proceed upon the broader fields of commercial and trade regulation elastic enough to adapt itself to every recurring difference of condition and circumstance. Our act requires this. That is why the Commission itself exists, and the reason for the anomalous statutory jurisdiction we are exercising. If we proceeded on the usual lines of technical law judgments the ordinary jurisdiction would suffice. We feel quite sure that so considered the action of the Commission in this case is not sustained by these English precedents or any of them.

The question has never been decided in our own courts so far as we are advised. In the case of the Hezel Milling Company v. St. Louis, etc., R. R. Co., 5 Int. St. C. C. Rep., 57, the Commission follows its judgment in the case we have in hand, under circumstances, as to one of the carriers, more like Evershed's case in the condition that the disputing shippers were using same service and cartage was allowed to one and not to the other, on the theory that the case was decided; namely, that the two cities of St. Louis and East St. Louis were one shipping community, in the practice of the companies. But it was said that if that theory be discarded and they were treated as separate communities, then it would not be a violation of the long and short haul statutory rule, because the rates on both sides of the river would be the same, and then the only consideration open would be the "subordinate matters above mentioned"—that is, equality of accessorial service. The Commission pertinently remarks that it is easy to see that questions of practice under partial or absolute "free cartage" must depend largely for solution on the particular circumstances of each case. In their order in the case now under consideration we think they did not give due weight to the circumstance so peculiar here of the remotely located station house relatively to the nearer station houses of its rivals and the cost to the company of overcoming that condition by locating as favorably as its rivals, nor to the circumstance that this is a controversy not between shippers of the same shipping community in rivalry with each other, but of remotely separated stations on the same road having no competition with each other in trade, and not similarly disadvantageously situated as to railway station houses.

In the case of the Clyde Steamship Company, supra, and the subsequent case of the Cerke Brewing Company v. L. & N. R. R.,
154 [32 5 Int. St. C. C. Rep., 596, the Commission reached the conclusion, as we understand it, that the competition of rival lines is to have its influence, if it be outside the control of the Commission itself, but if inside that control it can have no influence, except when the Commission shall upon preliminary inquiry permit it to operate and direct the regulations. We do not know that the courts have approved this rule of distinction, nor that we are called upon to decide the question, since we may place our judgment upon this point upon the ground that long before the interstate-commerce act and long before the existence of the Commission, almost a quarter of a century before, this

defendant company was using this accessorial cartage service, and it was not bound on the passage of the law and of the creation of the Commission to suspend or abandon that service and await an application for its sanction. It might go on we think and justify, if it could do so, when its practice should be called into question. So this case does not fall within the Commission's rule, perhaps.

It is not impossible that where competition is free and open to all alike, where every carrier involved is under the control of the Commission, where it is only a question of the adjustment of freight rates and not at all one of overcoming physical disadvantages which operate to shackle one of the competing lines, this rule might be approved by the courts. But where it is one of accessorial services or terminal facilities, or the choice by a company of methods of securing access to the goods to be carried in this physical sense, and not wholly of mere rates to be charged, we doubt if the rule could be applied even by the legislature, certainly not by the Commission, without unreasonable if not unlawful restrictions upon the rights of property involved. (Atchison, etc., R. R. Co. v. Denver, etc., R. R., 110 U. S., 667, 682; North Pac. R. R. v. Dustin, 142 U. S., 492; Exparte Koehler, 23 Fed. Rep., 529; S. C., 25 Fed. Rep., 73; Little Rock, etc., R. R. Co. v. St. Louis, etc., R. R. Co., 41 Fed. Rep., 559.) But in no case is the effect of this competition of rival lines a question to be settled by presumptions, prima facie or conclusive, as to similarity or dissimilarity of condition and circumstance; nor is it a question of the power of the Commission to mitigate hard conditions, though sometimes it certainly can not do that, as in this case, by any remedy it can afford, such, for example, as by putting this company on an equality with its competitors in the matter of location of its station house. It is a question of fact what influence competition shall have in justifying rates, and these rules of evidence one way or the other are at most only means of ascertaining the fact but not rules for distributing between them the powers of the Commission and the railroad company in the matter of establishing the rates. The statute prescribes no such distinction between classes of competition that are to justify or not to justify discrimination in rates; nor to authorize the railway company to act without the sanction of the Commission, as suggested; and if it may be true that the powers conferred on the Commission are broad enough to imply this distinction based on the potency of its control, we can not say that it should be implied. If Congress had intended so important a rule of statutory construction, the ordinary method of legislation requires that it should not have been left to implication. Whether the competing lines are within the control of the Commission or not, under some peculiar conditions, the railroad company must act for itself in fixing rates, we should think; and in any case, if on final adjudication of the
155 [33 fact of the influence competition should have in the given case the discrimination is justified by the fact, the failure to apply to the Commission in the first instance is only a misprision of administration under the act, and can not be held to impose any penalties of evidential presumptions in trying the fact. The trial of it proceeds in the courts on the same rules of evidence as to presumptions, burden of proof, and the like, whether the Commission has acted preliminarily or not, and only the legislature can alter this right of the company to have the question of the justifying facts tried in that ordinary way in which

such disputed facts are established. This ruling of the Commission on the effect of competition and its operation in practice overrules its formerly expressed views on the subject of the initiative in action as laid down in the case of the petition of the Louisville & Nashville R. R. Co., 1 Int. St. C. C. Rep., 30; and it distinguishes the cases in the courts which may be taken against its new ruling, and we need not cite them; nor, indeed, do we think we are required to decide that point in this case, for the reason already stated, and need go no farther than to say that the circumstance that the defendant company did not apply to the Commission to permit the cartage it had so long used can not be held anywhere to be a presumption against it of similarity of conditions and circumstances. We try the case in the courts de novo, on the facts there presented, but on the prima facie truth of the findings of facts by the Commission, which is not, however, the presumption to which we have just adverted. Neither before the courts or the Commission is there any presumption against the carrier that the conditions or circumstances are similar or dissimilar. Int. St. Com. C. v. Cincinnati, etc., R. R., 56 Fed. Rep., 925; Int. St. C. C. v. Atchison, etc., R. R., 50 Fed. Rep., 295; Osborne v. Chicago, etc., R. R. Co., 45 Fed. Rep., 49, was overruled in the circuit court of appeals, but without any expression of opinion on this particular subject or reference to that which is said in the court below about it. (Chicago, etc., R. R. Co. v. Osborne, 62 Fed. Rep., 912.)

These cases and others to which they will lead leave the question of the influence of competition as a circumstance or condition to justify discriminating rates undecided. In the case of Int. St. C. C. v. Texas & P. R. R., 52 Fed. Rep., 187, strong views were expressed against its influence, based largely on some of the English cases to which we have called attention, and some of which, upon the authority of later cases, may be of doubtful force, as we have shown; but on appeal the question was reserved, and the court said of foreign competition, held by the Commission not to be of itself a circumstance or condition of dissimilarity—what applies quite as well to that which arises at home—that "its ultimate decision may have a wider influence upon the interstate commerce of this country than we can foresee." (Int. C. C. v. Texas & P. R. R. Co., 57 Fed. Rep., 948.) We do not feel called on to decide the broad question in this case, and, as was done in that case, limit what we do decide to the narrower field presented by these facts. The bare, naked fact of competition in an open field may not be available to justify discriminating rates on the ground of dissimilar conditions, but it is not to be excluded as a forceful element of consideration when it results, as here, in the annihilation of the business of a carrier at a particular station on its line because of a physical or mechanical disadvantage which it may overcome by the use of an appliance which it has long used for that pur-
156 [34 pose, and the use of which is complained of and called in question as an unlawful discrimination under the act. The peculiar condition here is the physical disadvantage existing, whether there be competition or not, but which becomes destructive and fatal when competitors do appear to take advantage of it. The competition is not then a bare and naked struggle for traffic on equal terms, where carriers seek advantage of each other by discriminating rates, or where they use the competition to compel the public to make up the losses to themselves by

increased rates elsewhere and outside of its influence, but becomes in combination with the physical imperfection a totally destructive agency. In such a case, however it may be in others, the fact of competition is a dissimilar condition or circumstance, whether within control of the Commission or not. The case of Ilwaco v. Nav. Co., 57 Fed. Rep., 673, where the defendant company was allowed the exclusive use of its wharf, somewhat illustrates the distinction we enforce. It was said by the court that "for a carrier to prefer itself in its own proper business is not the discrimination which is condemned." See also on this point of self-preference legitimately exercised, Little Rock, etc., R. R. v. East. Tenn., etc., R. R. Co., 47 Fed. Rep., 771, 776. So, we say, that for a carrier to protect itself against the physical disadvantage it is under in relation to its rivals is not an unlawful discrimination if it be not used as a colorable device to evade the act. And we find in the case of Carden v. Bond, 39 Fed. Rep., 54, an illustration that an expense of accessorial service paid by the carrier for its own advantage does not necessarily amount to a discrimination when by deducting it from the rate a difference in rate mathematically appears. There a carrier compressed the cotton bales of a certain shipper at its own expense, and another shipper complained that the expense should be deducted from the usual rate he paid for cotton not compressed, and it was held that as he could have had his cotton bales compressed on the same terms there was no discrimination. Plainly it was no concern of the plaintiff in that case whether the carrier compressed his cotton or not, so it was carried according to the contract; as it is on the particular facts of this case no concern of Ionia whether Grand Rapids has cartage or not, so long as it only pays an equal rate for a shorter haul, which is not of itself forbidden.

From what has been already ruled, it is apparent that even if the Commission had established by its inquiry an abuse to be remedied, the order it gave was not a proper one and should not be enforced. Large as its powers may be and plenary as may be the authority of the court to enforce by mandatory injunctions or otherwise obedience to its orders, its powers are those of regulation, and not construction or reconstruction. Inter. St. Com. Com. v. B. & O. R. R. Co., 43 Fed. Rep., 37; 50 S. C., 145 U. S., 263. And now see Cincinnati, etc., Ry. Co. v. Int. St. Com. Com. (not yet reported), Sup. Ct. U. S., Oct., 1895.

This is, as the Commission has made it, a dispute about discriminating rates, and the easy remedy on such a complaint is a readjustment of the rates to cover the discrepancy. As was said in one of the cases we have cited, the method of redress by readjusting the rates must always be left to the choice of the company, at least in the first instance, and in the subsequent St. Louis case, supra, the Commission adopted that course and made the proper order. Here was an arbitrary and peremptory
157 [35 order to abandon the accessorial cartage at Grand Rapids without regard to any rates, or without option as to readjustment of them, the defendant company not even being allowed the alternative of establishing a like service at Ionia. It is in its nature not a regulation of commerce so much as an interference with the rights of property and its use which possibly even Congress could not in this way prohibit. At all events it is an attempted exercise of a legislative power which Congress has not, we think, conferred upon the Commission. (Northern Pacific R. R. v. Dustin, supra.)

Nor was there any power in the circuit court to modify or change the order of the Commission. Whatever may be the plenary power of a court of equity to command at the suit of those who are injured the performance of any duty arising out of a contract or statutory obligation, the jurisdiction it was exercising here is strictly special and statutory, and is limited as all special jurisdiction is to the precise power conferred by the interstate-commerce act, which is only to compel obedience to the "lawful order" of the Commission. It has not been granted any broader power to exercise the authority of the Commission itself by substituting a new regulation or order of its own, or modifying that which the Commission has given. It is purely an auxilliary jurisdiction. (Int. C. C. v. Delaware, etc., R. R. Co., 64 Fed. Rep., 723.) The ordinary jurisdiction of the courts is open to any one injured to invoke their more plenary powers, except so far as that of an action at law for damages has been made optional with the cumulative statutory remedy by sec. 9 of the act. The remedy by bill in equity has not been so restricted and is yet available, but here the powers of the Commission, being administrative and not judicial, the ancillary and supplemental judicial jurisdiction is necessarily limited to the purpose of its creation, and can go no farther than to grant or refuse compulsory obedience to the lawful orders of the Commission and as it makes them. (Int. Com. Com. v. Delaware, etc., supra; Kentucky Bridge Co. v. L. & N. R. R. Co., 37 Fed. Rep., 567; Int. C. C. v. Lehigh Valley R. R., 49 Fed. Rep., 177; Shinkle, etc., v. L. & N. R. R. Co., 62 Fed. Rep., 690; Little Rock, etc., R. R. Co. v. East Tenn., etc., R. R. Co., 47 Fed. Rep., 772.)

It confirms our confidence in the rulings we have made that since this opinion was prepared the Supreme Court has announced its decision in one of the cases herein cited, appealed to that court, in an opinion by Mr. Justice Shiras, which, although presenting differing facts, is in entire harmony with the views we have here expressed. (Texas & Pacific R. R. v. Interstate Commerce Commission (not yet reported, March 30, 1896).)

In any view, therefore, either because this order was not according to the right of the case, as we understand it, or because it directed an improper mode of redressing the abuse, if any existed, the decree must be reversed, and the cause remanded to the circuit court with directions to dismiss the petition with costs.

158 And afterwards, to wit, on May 21st, A. D. 1896, the following petition for appeal was filed in said cause, which reads and is as follows:

159 *Petition for appeal.*

United States circuit court of appeals, sixth circuit. In equity.

THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION, APPELLEE. } No. 252.

The Interstate Commerce Commisson, by Harlan Cleveland, United States attorney, under the direction of the Attorney-General of the

United States, represents that in the final decree of said circuit court of appeals, rendered on the 14th day of April, 1896, there is manifest error to its injury; and, therefore, being a department of the Government of the United States, it prays for an order granting an appeal from said decree to the Supreme Court of the United States, and presents herewith its assignment of errors.

HARLAN CLEVELAND,
United States Attorney for the Southern District of Ohio.
L. A. SHAVER,
Attorney for Interstate Commerce Commission.

Appeal allowed.

HORACE H. LURTON, *Cir. Judge.*

(Indorsed:) = 252. Petition for appeal. Filed May 21, 1896. Frank O. Loveland, clerk.

160 And afterwards to wit, on the same day, that is to say, on May 21st, 1896, the following assignments of error were filed, which read and are as follows:

161 *Assignment of errors.*

United States circuit court of appeals, sixth circuit. In equity.

THE DETROIT, GRAND HAVEN & MILWAUKEE RAILway Company, appellant,
vs.
THE INTERSTATE COMMERCE COMMISSION, APPELLEE. } No. 252.

And now comes the Interstate Commerce Commission, by Harlan Cleveland, United States attorney, under the direction of the Attorney-General of the United States, and charges that in the decree rendered by said circuit court of appeals in the above-entitled cause on the 14th day of April, 1896, and in the record and proceedings in said court, there is manifest error to its injury, in this, to wit:

1. That said circuit court of appeals erred in reversing the decree of the circuit court in said cause.

2. That said circuit court of appeals erred in remanding said cause to the circuit court, with directions to dismiss the petitions of the Interstate Commerce Commission.

3. That said circuit court of appeals erred in not decreeing the enforcement of the order of the Interstate Commerce Commission.

4. That said court erred in finding that the cartage service rendered by the Detroit, Grand Haven & Milwaukee Railway Company to
162 its customers at Grand Rapids was not a part of the transportation service itself, and that the carriage by rail and the cartage were not a continuous carriage within the meaning of the act to regulate commerce.

5. That said court erred in finding that the circumstances and conditions existing at Grand Rapids were so dissimilar from those at Ionia as to justify said railroad company in charging as high a rate for the service of transportation to its station at Ionia, the shorter distance point, as it charged in the aggregate, both for such service to its station at Grand

Rapids, the longer distance point, and for the additional service of cartage from its station and delivery to its customers at Grand Rapids.

6. That said court erred in finding that, if a case of undue preference under the act to regulate commerce is established, the Interstate Commerce Commission can make no order "as to how the inequality should be reduced, and the choice between the different ways must always be left to" the carrier.

7. That said court erred in finding that there was no "power in the circuit court to modify or change the order of the Commission."

HARLAN CLEVELAND,
United States Attorney for the Southern District of Ohio.

L. A. SHAVER,
Attorney for Interstate Commerce Commission.

(Indorsed:) #252. Assignment of errors. Filed May 21, 1896. Frank O. Loveland, clerk.

163 And afterwards, to wit, on May 21st, 1896, the following order was entered in said court, which reads and is as follows:

United States circuit court of appeals for the sixth circuit. Appeal from the circuit court for the western district of Michigan.

THE DETROIT, GRAND HAVEN & MILWAUKEE Railway Co.
vs.
THE INTERSTATE COMMERCE COMMISSION. } No. 252.

In this cause the Inter-state Commerce Commission, by Harlan Cleveland, United States attorney, under the direction of the Attorney-General of the United States, having made its application in writing for an appeal from the final decree therein, rendered on the 14th day of April, 1896, to the Supreme Court of the United States, and the said Interstate Commerce Commission being a department of the Government, and it appearing that the matter in dispute in said cause exceeds the sum of five thousand ($5,000.00) dollars, exclusive of costs, it is therefore ordered that said appeal be, and the same is hereby, granted and made returnable on the day of , 1896.

Enter this.

(Signed) HORACE H. LURTON,
Circuit Judge.

Allowed by—

HORACE H. LURTON,
Circuit Judge.

164 United States circuit court of appeals for the sixth circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To the Detroit, Grand Haven & Milwaukee Railway Company, greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court to be holden at the city of Washington,

D. C., on the 26th day of June next, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the sixth circuit, wherein the Interstate Commerce Commission is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 27th day of May, in the year of our Lord one thousand eight hundred and ninety-six, and of the Independence of the United States of America the one hundred and twentieth.

HORACE H. LURTON,
Circuit Judge.

Service of this citation upon the said Detroit, Grand Haven & Milwaukee Railway Company this 29th day of May, A. D. 1896, is hereby acknowledged.

E. W. MEDDAUGH,
Solicitor for the Detroit, Grand Haven & Milwaukee Railway Company.

165 United States circuit court of appeals for the sixth circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record, together with the original petition for appeal and assignment of errors, in the case of the Detroit, Grand Haven & Milwaukee Ry. Co. vs. The Interstate Commerce Commission, No. 252, October term, 1895, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit, and of the whole thereof.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the sixth circuit, at the city of Cincinnati, Ohio, this eighth day of June, 1896.

[SEAL.] FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(Indorsement on cover:) Case No. 16318. Term No., 539. The Interstate Commerce Commission, appellant, vs. The Detroit, Grand Haven and Milwaukee Railway Company. U. S. circuit court of appeals, sixth circuit. Filed June 17, 1896.

167-633

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant, v. THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.	No. 539.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR APPELLANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE INTERSTATE COMMERCE COMMISSION, appellant, v. THE DETROIT, GRAND HAVEN AND MILWAUKEE RAILWAY COMPANY.	No. 539.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

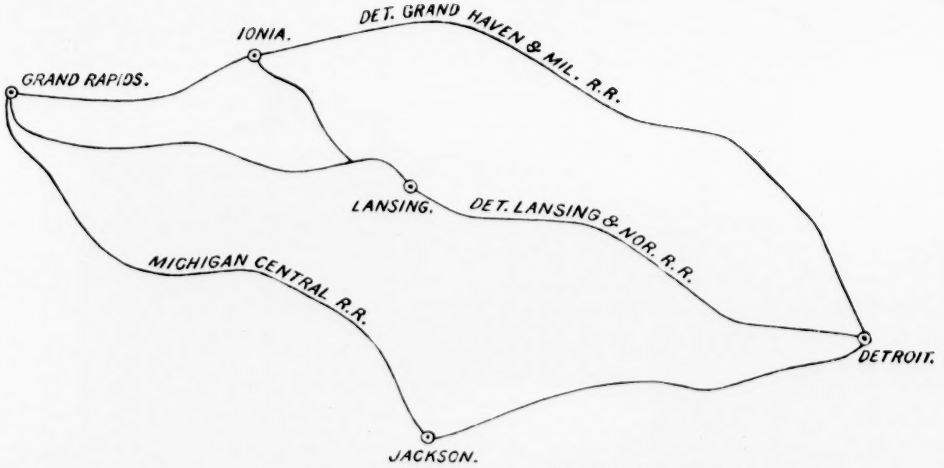
BRIEF FOR APPELLANT.

The appellee, The Detroit, Grand Haven and Milwaukee Railway Company (a member of the Grand Trunk Railway System, p. 31), operates a railroad running from Detroit westward to Grand Haven in the State of Michigan. In connection with eastern roads it is engaged in interstate commerce. Upon its line are the cities of Ionia and Grand Rapids, distant 124 and 157½ miles westerly from Detroit, respectively. It has an established tariff of freight rates to these points from New York, Philadelphia, and other points east of Detroit.

The accompanying diagram is taken (with some simplication of curves) from a standard atlas, and shows the relations of the railroads which compete for the business of these three cities, namely, the Detroit, Lansing and Northern, the Michigan Central, and the appellee. The mileage is inserted from their time-tables in the Travelers' Official Guide.

Stone & Carten, retail dealers at Ionia, petitioned the Interstate Commerce Commission on September 18, 1888, alleging that the appellee was unduly discriminating against Ionia and preferring Grand Rapids, in violation of §§ 2, 3, and 4 of the act to regulate commerce of February 4, 1887, c. 104, and alleging facts sufficient to bring the case within § 6 also (pp. 4, 5). The appellee answered, and the matter was heard upon "a written stipulation of facts which constituted the sole evidence on which the case was submitted for decision" (p. 11). The facts found were as follows (pp. 11, 12):

> 1. The complainants are copartners, doing business under the firm name of Stone & Carten, and are engaged in the sale at retail of goods, wares, and merchandise in the city of Ionia, county of Ionia, and State of Michigan, purchasing said goods, wares, and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Michigan.
>
> 2. That the respondent railway company is a corporation existing under and pursuant to the laws of the State of Michigan, and is a common carrier of passengers and property for hire between the city of Detroit and the city of Grand Haven, both of said places and its entire line of railroad being in the State of Michigan, but it does not own and control



	Detroit to Grand Rapids (miles).	Detroit to Ionia (miles).
Det., Grand Haven and Mil. R. R	157.50	124
Det., Lansing and Nor. R. R	153	126
Mich. Central R. R	170.8	

a line of steamboats plying across Lake Michigan between Grand Haven and Milwaukee, Wisconsin, but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan between Grand Haven and Milwaukee, from which the respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwaukee; that all of said boats are under the control and direction of an independent corporation, organized under the laws of the State of Michigan, by the name of the Grand Haven and Milwaukee Transportation Company; that the management of the business of the last-named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

3. The respondent, for its services as a common carrier for continuous shipment, under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published *a schedule of rates and charges, a tariff of freights which makes on all freights from Philadelphia, New York, and Boston, and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which are made and charged for the same class of freights to the merchants doing business at the city of Grand Rapids*, a copy of which schedule or tariff is hereto annexed and made and deemed a part of this stipulation.

[The schedule is not printed. It is clear, however, from the references to it that it makes the same rates to all patrons at Ionia as to Grand Rapids; and this, indeed, is presumable from the finding as to charges for the complainants, as otherwise the officers of the railroad would be guilty of a criminal offense under §§ 2, 10.]

4. The shipments of freight from Philadelphia, New York, Boston, and points east of Detroit, which are delivered to the respondent's road at said city of Detroit and transported by it over its line of railway, *pass through the city of Ionia before reaching the city of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.*

5. *That the respondent provides, at his own expense, depots, yards, and tracks, at the city of Grand Rapids,* for the service of transporting merchandise and freight generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston, and points east of Detroit between its station at Grand Rapids and the places of business of merchants, traders, and other patrons of its road at that place, *which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished* to complainants or other merchants, traders, and patrons of its road *at the city of Ionia;* that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said city of Grand Rapids is within the corporate limits thereof, and is, on an average, one and a quarter miles from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the city of Ionia is not to exceed an eighth of a mile from the business center of said city; that at the city of Grand Rapids there are two other railroads, the Michigan Central Railroad and the Grand Rapids, Lansing and Detroit

[Detroit, Lansing and Northern?] Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short haul to and from their stations, on an average about one-quarter of a mile; that respondent did the carting of freight to and from its station at Grand Rapids substantially in the same manner as at present long prior to the time when either said Michigan Central or Grand Rapids, Lansing and Detroit railroads constructed to that place.

6. *That the actual cost of carting* or draying freight from respondent's warehouse in the said city of Ionia to the several places *in said city of Ionia* to and from which traffic has to be hauled *is two cents per hundredweight*; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders, and other patrons of its road *at Grand Rapids is two cents per hundredweight.*

7. That there is but slight competition encountered by the complainants and other persons, firms, and corporations engaged in business at the city of Ionia interested in shipping over respondent's road, with similar business at the city of Grand Rapids.

9. That complainants have not brought any suit for the recovery of money or damage for which the respondent is alleged to be liable under the provisions of the act to regulate commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

10. The city of Grand Rapids has a population of about 70,000. The city of Ionia has a population of about 6,000. The freight traffic to and from

> Grand Rapids by all roads in 1887 amounted to 985,685 tons. The freight traffic to and from Ionia by all roads for the same time amounted to about 55,000 tons.
>
> 11. Cartage by railway companies in similar manner to that at Grand Rapids is conducted by other railway companies at exceptional stations in the State of Michigan, and more or less extensively practiced by companies in other States at exceptional stations.

The estimates of population in the tenth finding seem to relate to the townships, not to the cities proper. The findings were made before the census of 1890, which gives the populations of the townships as 68,603 and 5,964, respectively.

The case was held under advisement for over a year, the decision of the Commission being filed April 26, 1890 (p. 8). The case is reported as *Stone & Carton* v. *Detroit, Grand Haven & Milwaukee R. R. Co.*, 3 Int. C. C., 113. The opinion was written by Judge Cooley, who sustained the petition under § 4 (pp. 9–15). Commissioners Morrison and Schoonmaker sustained it also under § 6 (Judge Taft's reference to § 2 at p. 78 being erroneous). Commissioner Bragg dissented. Commissioner Veazey did not sit. The order entered upon this decision is based upon both holdings. It recites the following facts as found (p. 16):

> It is found and decided that the defendant has put into effect a tariff-schedule by which rates and charges for transportation of freights from Eastern points to Ionia and Grand Rapids, points on its line in the State of Michigan, are made the same, Ionia being a shorter distance from said Eastern points than Grand

> Rapids, and that the defendant, in connection with its transportation service, furnishes free cartage of freights at Grand Rapids to and from its station and its patrons' places of business, and does not furnish such free cartage at Ionia, *and that by reason thereof* said defendant does unlawfully give rebates from its published tariff or schedule of rates, fares, and charges at Grand Rapids to shippers and consignees at that point, *and* does by the same means unlawfully charge and receive a greater compensation in the aggregate for the transportation of like kinds of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, in violation of the provisions of the act to regulate commerce.

The judgment of the Commission was as follows (p. 16):

> It is ordered and adjudged that the defendant, the Detroit, Grand Haven and Milwaukee Railway Company, be, and it is hereby, required, within thirty days from and after the services of a copy of the report and opinion in this proceeding and of this order, *to wholly cease and desist from furnishing free cartage of freights at Grand Rapids*, in the State of Michigan, *whereby* rebates from its lawfully published schedule of rates, fares, and charges at its station or office in Grand Rapids are given to shippers and consignees, *and* charges for the transportation over its line of property shipped from eastern points to Grand Rapids, aforesaid, are made less than charges for the transportation over its line of like kinds of property shipped from the same eastern points to Ionia, in the State of Michigan.

The railroad company politely refused to obey the Commission (p. 17), and this proceeding was thereupon

instituted, praying an injunction to compel obedience, and for general relief (pp. 1–4). The company answered (pp. 18–20) and produced testimony (pp. 23–75); and the cause came on for final hearing before Judges Taft and Severens at circuit, their opinions being filed October 6, 1893 (pp. 76–91). (*Interstate Commerce Commission* v. *Detroit, Grand Haven & Milwaukee Ry. Co.*, 57 Fed. Rep., 1005.) They differed in opinion, and a decree was entered in accordance with the views of Judge Taft, which were in favor of the petitioners, although modifying in form the order of the Commission. Omitting recitals, it is as follows (p. 93):

> It is hereby ordered, adjudged, and decreed that the mandatory writ of injunction of this court do issue to said respondent, The Detroit, Grand Haven and Milwaukee Railway Company, commanding it and its officers and agents to forthwith desist and refrain from affording said free cartage at said city of Grand Rapids, *unless* a like service or its equivalent in value by reduced rates be at the same time afforded at said city of Ionia, *and unless* the fact that such free cartage or such equivalent reduced rate is afforded at both points shall be noted on the established tariffs of freights and charges published as required by law.
>
> The right of the petitioners is reserved to apply to this court for any further or other order in this cause, based on the neglect or failure of said respondent promptly and fully to comply with the letter and spirit of this decree.

The circuit court of appeals reversed the decision with a very elaborate opinion by Judge Hammond, concurred in by Judges Lurton and Sage (pp. 99–134; *Detroit*,

Grand Haven and Milwaukee Ry. Co. v. *Interstate Commerce Commission*, 74 Fed. Rep., 803). From that reversal the present appeal is taken.

INTERSTATE-COMMERCE LAW.

The sections of the law which have been referred to in this case are as follows:

> § 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.
>
> § 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *
>
> § 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like

kind of property, *under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance;* but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

§6. (As amended March 2, 1889.) That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges *for the transportation of passengers and property* which any such common carrier has established and which are in force at the time *upon its route*. The schedules printed as aforesaid by any such common carrier shall plainly state *the places upon its railroad between which property and passengers will be carried*, and shall contain the classification of freight in force, and shall also state separately *the terminal charges* and *any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges.*

* * * * *

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, *it shall be unlawful for such common carrier to charge,*

demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedules of rates, fares, and charges as may at the time be in force. * * *

"SEC. 12. (As amended March 2, 1889, and February 10, 1891.) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act. * * *

SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission *by petition, which shall briefly state the facts;* whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a

reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. * * *

SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, *that anything has been done or omitted to be done in violation of the provisions of this act*, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, *or by other parties aggrieved* in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with *a notice to said common carrier to cease and desist from such violation*, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission. * * *

SEC. 16. (As amended March 2, 1889.) That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amend-

ment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear *and determine* the matter speedily *as a court of equity*, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but *in such manner as to do justice in the premises;* and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; *and on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated;* and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same. * * *

The following definition in § 1 is also important:

> The term "transportation" shall include all instrumentalities of carriage.

The carriers to whom the act applies are those engaged in interstate, etc., transportation "wholly by railroad or partly by railroad and partly by water." The same section discriminates between "*transportation* of passengers or property" and "receiving, *delivering*, storage, or handling of such property."

STATEMENT OF FACTS.

The facts as found by the Commission have been hereinbefore set forth at length. Briefly, the important facts thus found are as follows:

The appellee furnishes free cartage at Grand Rapids, not at Ionia, although the two cities are in the same "group"—that is, the rates from points east of Detroit are the same to each. The special features in the situation of the two cities are as follows:

Grand Rapids (township) has a population of about 70,000, Ionia (township) of about 6,000.

Grand Rapids has a freight traffic of 785,685 tons, Ionia of 55,000 tons.

Competition is but slight between the two cities.

Two rival railroads compete with appellee at Grand Rapids, and their stations are about a mile nearer the business center of the city. This competition is not the cause of the free-cartage system, which existed long before either rival was built. It may be added also, as a well-known fact of railroad geography of which this court

can, as the circuit court did (p. 85, foot), take judicial notice, that one of these railroads, the Detroit, Lansing and Northern, competes at Ionia also.

The distance of the appellees' station at Grand Rapids "from the business sections of said city where the traffic of the places tributary to respondent's road originates and terminates" averages 1¼ miles; at Ionia, ¼ mile; but the expense of carting is the same at both places—2 cents per hundredweight.

It is also found to be customary to permit free cartage "at exceptional stations" and that the custom has existed at Grand Rapids for 25 years; but this is believed to be immaterial. The extent of this practice was investigated by the Commission at the time this controversy was pending before them, with the result shown in IV, 3 *infra*.

The evidence offered by appellees after the case was brought into the circuit court was in the main not in conflict with the above findings, which were, indeed, binding upon the company by its own stipulation. The new proof related almost entirely to certain alleged usages of railroad companies, which are claimed to have a bearing on the right to give free cartage.

These alleged usages are none of them uniform or definite. They all have exceptions (p. 48), and the exceptions seem to be pretty large. Such as they are, they may be described as follows:

Team tracks.—At the larger stations railroads commonly deliver through their warehouses, doing their own loading and unloading (pp. 67, 70). At smaller stations

sidings are provided called "team tracks," at which consignees are expected to load and unload for themselves (pp. 55, 65–67, 70).

Belt lines and spur tracks.—To persons situated thereon goods are generally delivered at the same rates as at the main station (pp. 24, 40, 68–70).

Private sidings or switch tracks.—Delivery at those is generally free of charge (pp. 24, 37, 40, 43, 69), but is generally allowed in the case of carload lots only (pp. 43, 48, 58). Sometimes delivery in smaller amounts at sidings is allowed (pp. 30, 31, 50) as a favor (p. 60), but is not considered legitimate (p. 49), and they are expected to be called for at the station (p. 50). If the company can not spare the necessary land, the person desiring this special accommodation is generally expected to furnish the right of way (pp. 30, 42, 48, 57). Generally the railroad pays for the track (p. 30), but sometimes, at a noncompetitive point, the shipper has to pay (p. 42). At competitive points it is customary to put them in whenever asked for (p. 42). The loading and unloading is generally done by the owner of the siding (pp. 48, 68, 70). Other railroad companies, desiring access to belt lines, spur tracks, or private sidings, generally pay "switching charges" of varying amount (pp. 24–5, 40, 41, 45, 46, 53, 64–5, 69), bearing the expense themselves (pp. 46, 49, 53, 64) as an allowance to get business which otherwise they can not reach (p. 49).

Free cartage.—This prevails at certain points specified (pp. 27, 31–2, 34, 38, 47, 63), and there is a similar custom of free lighterage at certain ports (pp. 67–8, 71–2).

It is given sometimes only to freight bound in one direction (pp. 60, 74); sometimes only as to certain kinds of freight (pp. 33, 35–6, 55–6). Free cartage is initiated by railroads having inferior terminal facilities at certain competitive points (pp. 24, 32, 46, 52), and as a rule is confined to such points (p. 61), but many or most competitive points, as Ionia itself, enjoy no such privilege. Sometimes it is in the form of an allowance to persons owning teams (p. 34), and, being not universal, is in fact a commission (p. 29). When universal throughout a given city, it is on the whole beneficial to the community which enjoys its advantages (pp. 25, 37, 41, 43, 44, 46, 52, 53), as is plain enough except in the case of persons who do not want the privilege. When established by a local custom it influences the selection of factory sites (p. 75).

The appellee claims its system of free cartage at Grand Rapids to be cheaper to itself than building a spur track into the present business center (pp. 41, 46, 53), and it claims that it would lose the bulk of the business if it did neither one nor the other (pp. 25, 41, 43, 46); but we shall show that the latter claim must be taken *cum grano salis*. Its station was built nearly forty years ago, but the position was ill chosen, and business had moved away from it (p. 72). The persons who do the carting perform other services also for the company (pp. 25, 41, 46, 54, 60); but these are immaterial to the present controversy.

The free cartage at Grand Rapids, as above stated, is not due to competition there. It existed long before there was any competition. It exists at Port Huron,

where there is no rail competition on east-bound business (pp. 56–7). It does not exist as to west-bound traffic at Detroit. It does not exist at Ionia at all. Its existence at Grand Rapids is probably due to foreign influences, as suggested by Judge Hammond (p. 105):

> In this case the proof is that it is very exceptional for the railroads to do the carting required in collecting and delivering the goods, and it is said in argument that it obtains nowhere except upon the Grand Trunk Railroad and those connected with it or influenced by it, and this is perhaps accounted for by the fact that the Grand Trunk system has its origin and home in Canada, where, most likely, they would follow the English practice rather than ours.

In a nutshell, the evidence as to custom amounts to this: At certain favored points people have free sidings when near enough to the railroad, and free cartage when not near enough. These towns consequently grow, and property becomes more valuable. At other points people have to do their own carting, and pay for their own sidings.

Grand Rapids belongs to the former class, Ionia to the latter. Grand Rapids, as shown by the census, grew from 18,157 in 1870 to 68,603 in 1890; Ionia only from 4,158 in 1870 to 5,964 in 1890.

The schedules of rates contain nothing showing any difference in terminal services between the two cities.

Two main questions thus arise:

Is the competition at Grand Rapids a sufficient excuse for the greater terminal facilities?

Is it proper to allow them without specifying them on the schedules?

ASSIGNMENTS OF ERROR.

The first three assignments of error (p. 135) are to the decree of reversal as a whole. The fourth, fifth, and sixth (pp. 135–6) are argumentative. The seventh (p. 136) is to the ruling of the circuit court of appeals that there was no "power in the circuit court to modify or change the order of the Commission."

ARGUMENT.

It will be convenient to treat the case, first, as it came before the Commission, and, second, as it came before the court.

§ 2 of the statute is referred to in the petition of Stone & Carten, but is not the basis of the decision of either Commission or court (the statement to the contrary at p. 78 being erroneous).

§ 3 also (the undue preference clause) is immaterial at the present stage of the case. Undoubtedly a preference is granted to Grand Rapids over Ionia, but whether the preference is undue or unreasonable within the meaning of the clause in question was not decided by the Commission. Their decision was based upon other sections of the act. Nor did the circuit court base its decision at all upon this provision. Hence we shall submit no argument upon it.

This leaves for consideration § 4 (the long and short haul clause) and § 6 (the schedule clause). Under § 4 we seek to protect the shippers of Ionia. Under § 6 we seek to protect the humbler and more ignorant shippers of Grand Rapids, that they may not suffer through lack of publicity of the privileges which their larger rivals

enjoy. Whether or not there be now actual suffering at Ionia or at Grand Rapids, there is at many places of which this case gives a type, and the principles here involved are of extreme importance.

It may be suggested that § 6 was not specifically referred to in the petition of Stone & Carten, and did not receive the support of a majority of the Commissioners at the time of filing the opinion (Judge Cooley stating the point as made by two of his associates without expressing his own opinion thereon).

Its omission in the petition of Stone & Carten is immaterial, for two reasons: First, sufficient facts were alleged to bring the case within that section, although no reference was made to it; and, second, the Commission is in nowise restricted to the allegations of the petition either as to matters of fact or matters of law. When complaint is made that a railroad company is violating the act, the Commission must take cognizance of the matter whether it finds that the "injury or damage has been sustained by the party or parties complaining or by other parties aggrieved." It is bound by no common-law technicalities, but takes jurisdiction of the whole controversy, with a view to proceeding against the common carrier for whatever violation of law is disclosed. (§ 15.) In the present case Stone & Carten, merchants of Ionia, by their complaint led to the disclosure of a grievance to other parties, namely, the aforesaid shippers of Grand Rapids.

It is not at all necessary for the petition to specify the provisions of law which he believes to have been violated. It is sufficient if he "shall briefly state the facts" (§ 13).

It is not even necessary that there should be any petition at all (§ 12).

The opinion of the Commission was filed April 26, 1890 (p. 8). At that time, as above stated, Judge Cooley did not commit himself as to the point raised by Commissioners Morrison and Schoonmaker under § 6, saying simply (p. 15):

> It follows that the long and short haul clause of the fourth section of the act to regulate commerce is violated, and consignees at Ionia are overcharged to the extent indicated. The complaint will be sustained on that ground, and order will be entered accordingly, without expressly passing upon other points raised.

The order was not entered until May 12 (p. 15). It speaks for the whole Commission, and is as broad as the opinion of the two last-named Commissioners. It makes this recital with reference to the free cartage furnished at Grand Rapids (p. 16):

> That by reason thereof said defendant does unlawfully give rebates from its published tariff or schedule of rates, fares, and charges at Grand Rapids to shippers and consignees at that point;

and orders that it "cease and desist from furnishing free cartage of freights at Grand Rapids," with the following as one of the two qualifications to this general language:

> Whereby rebates from its lawfully published schedule of rates, fares, and charges at its station or office at Grand Rapids are given to shippers and consignees.

Judge Severens was therefore misled in supposing that the order stands upon the long and short haul clause alone (p. 85).

I.

The Commission correctly held this free cartage to be a violation of the sixth section.

The schedules themselves are not now to be found in the record. They were originally incorporated in the opinion of the Commissioners (p. 11), but the original petition to the circuit court, to which a copy of the Commissioners' proceedings was annexed, was mislaid or lost, and the present copy has been substituted by a stipulation since the decision of the circuit court (p. 18). It does not appear whether a copy of the schedules was before the circuit court at the argument or not. By some oversight they were omitted from the substituted record, and for this reason were not before the circuit court of appeals.

For present purposes, however, the record is sufficient. It does not appear what the rates were on different articles transported from eastern points to Grand Rapids and Ionia, but it appears affirmatively that the schedules showed the same rates to both places, and that they did not show the privilege of free cartage enjoyed by Grand Rapids (pp. 11, 16). While the statement as to the Ionia rates refers in express terms to Stone & Carten only, it is clearly applicable to all other merchants at Ionia (since otherwise the officers of the railroad would be criminally responsible under §§ 2, 6, 10), and it has been so understood by all of the commissioners and judges who have discussed this case.

Hence the failure to refile a copy of the mislaid schedules is no embarrassment.

(1) *The rates shown on the schedules are presumptively station-to-station rates, the practice of collection from the shipper and delivery to the consignee at their respective warehouses being altogether exceptional.*

This is conceded by everybody.

Judge Cooley says (p. 14):

> It must be conceded, however, that cartage is not in general a terminal expense, and is not in general assumed by the carrier. The transportation as between the carrier and its patrons ends when the freights are received at the warehouse, and the charge is made for a service which ends there.

Judge Taft says (p. 81):

> It is conceded that the contract of carriage of a railway common carrier as usually understood is the transportation of the goods from the warehouse of the railway at the point of shipment to the railway warehouse at the point of destination. * * * It is very clear that free cartage is exceptional, and that it is a departure from the usual terminal facilities furnished either at large or small cities and towns.

Judge Severens says (p. 88):

> The rate schedules of the carrier ordinarily, and probably almost universally, and the bills of lading issued thereon, in terms contemplate the station of the carrier as the locality to which the freight is consigned as the terminus of transportation and the place of delivery.

Judge Hammond says (pp. 102–3):

> Carriers by water *ex necessitate rei* received the goods at the ship side or the wharves adjacent thereto and delivered them at like places, the consignors

> and consignees, respectively, bringing them to and taking them from those places at their own expense. * * * In America, as we judicially know, the almost universal practice of the railroad people is to receive and deliver as water carriers do. * * * It is a mistake to suppose that either in England or America this cartage service for railroad transportation is a part and parcel of that transportation itself, strictly considered, as it certainly was in the previously existing carriage by land; but it is in both countries, as it always was in water carriage, a distinct, disconnected, and separate service from the rail carriage, and in its nature, as we have called it, purely accessorial.

He also points out that it is doubtful whether such cartage, without special legislative authority, is lawful, and that in the present case it is done under special legislation of the State of Michigan (p. 105).

(2) *Congress acted upon this presumption that the transportation rates scheduled are station-to-station rates. The presumption is therefore conclusive.*

This appears from a comparison of the first and sixth sections.

§ 6 provides for "schedules showing the rates and fares and charges for the *transportation* of passengers and property * * * in force at the time *upon its route*." The schedules must state "the places *upon its railroad* between which property and passengers will be carried," and also shall state *separately* "the terminal charges."

§ 1 provides that the act shall apply to carriers "engaged in the *transportation* of passengers or property wholly by railroad or partly by railroad and partly by

water," the word "railroad" including "all barges and ferries" and the word "transportation" including "all instrumentalities of shipment or carriage." But "the transportation of passengers or property" is in the same section twice spoken of in contradistinction to "receiving, delivering, storage, or handling of property." Receiving, delivering, and handling property are all services rendered by instrumentalities of carriage, whether by ordinary baggage trucks about passenger stations, by any of the corresponding appliances about freight stations, or by cartage. Hence the "transportation" charges are clearly those for carriage between stations; and the "terminal charges" in § 6 are the same as the charges for "receiving, delivering, storage, or handling of property" in § 1.

It thus follows that

(3) *Cartage, when furnished by the railroad company for compensation, must be scheduled as a terminal charge.*

The learned circuit court of appeals argue subtly that cartage is neither a transportation service nor a terminal service, but an "accessorial service" not mentioned in the statute at all—one, therefore, we understand it to be maintained, as to which the company is bound by no rule of fairness or uniformity.

We are unable to perceive the basis for this distinction. Wherefore is Congress believed to have contemplated this exception to its general rule? Is there any motive of public policy which could lead to such an exception? Could any word more apt than "delivering" have been selected to include the service of cartage? Can a court

draw an arbitrary line at the platform, the street, the next block, or anywhere else where the railroad company may deliver goods, and say, "Congress meant that charges for the delivery should be public and uniform up to this point, but no further?" Cartage is an extra-terminal or accessorial service in the sense that it is not necessarily or customarily rendered by railroad companies, but we believe it to be clearly a terminal service within § 6 when actually rendered. Ordinary terminal services can not be charged for. Thus the carrier may not "charge the shipper for the use of its general freight depot in merely delivering his goods for shipment." (*Covington Stock Yards Co.* v. *Keith*, 139 U. S., 128, 135.)

The point has no direct bearing on the case at bar, and is inserted only for completeness of view and because it seems to have been disputed.

(4) *Cartage, when furnished by the railroad company "free," must be scheduled also.*

Cartage is a service not ordinarily rendered at terminals. It has a definite market value, and is taken into consideration by every business man in his calculations. The price of transporting his goods determines the price at which he can afford to sell them; and this is made up of the cartage, *plus* the "transportation" in the narrower statutory definition. If A and B are merchants in the same city, and A gets free cartage while B does not, often A succeeds while B goes into bankruptcy.

It is thus immensely important that a system of free cartage should be publicly known, for the protection of the shippers at the locality where the system exists; and

it will be remembered that this point is pressed, not for the benefit of the Ionia shippers, but for the occasional and presumably less well-posted shippers at Grand Rapids, who are "other parties aggrieved." (§ 15.) Is it publicly provided for?

Besides the transportation rates, the terminal charges, etc., the schedules must state separately "any rules or regulations which in any wise *change*, *affect*, or *determine* any part or the aggregate of such aforesaid rates and fares and charges." (§ 6.)

This provision was evidently intended to cover all attempts at secret favoritism by nominally granting equality where there is substantial inequality. Does it accomplish its purpose?

Free cartage *changes* the rates. It is absurd to say that the cartage is really "free." It is a service rendered for a consideration. Otherwise the carrier would not render it, and could not lawfully render it. To get A's business (if it is a legitimate business operation), or to give A a lift (if he is a director's brother-in-law), his package is transported from the station at Buffalo to his store in Grand Rapids for x cents. B's package is transported only to the Grand Rapids station, and he pays x cents also. If it cost the railroad 25 cents to deliver A's package, then the freight rate to A for the "transportation" proper is $x - 25$ cents. It is changed from the general rate paid by B.

But in order to avoid any possible narrowness of construction arising from the word *change*, § 6 adds the word *affect*. There is no reason to infer that Congress used

the latter in any sense different from that in which it would be used by the ordinary business man, whether shipper or carrier. He would certainly be surprised to hear that free cartage did not affect freight rates.

Furthermore, free cartage clearly *determines* freight rates.

The railroad company desires to get A's business away from some rival. It can do this in various ways. It can directly reduce his freight rate. It can give him a rebate under the name of cartage, commission, bonus, or what not. It can render him, nominally *gratis*, service of some definite market value, such as cartage. Whether he be nominally given the cartage *gratis*, or be repaid its equivalent in cash, or be given a secret freight rate reduced to the same extent, is all the same to him and all the same to the railroad company. It is a mere question of accounting.

Where, as is the case in some States as to their internal traffic, railroads may discriminate in rates between individuals so long as all rates are "reasonable," the special rate given to each large shipper would be determined (among other things) by the decision of the question whether to give him "free" cartage. If it were cheaper for the shipper to cart than for the railroad company, he would get his advantage in the form of a lower freight rate. If it were cheaper for the railroad company to cart than for the shipper, he might get it, in whole or in part, in the form of "free" cartage.

The same rule would hold as between localities; and if "free" cartage became a universal custom at all localities, all freight rates would presumably be raised.

The undersigned was once engaged in a litigation which illustrated the working of this principle in the form of a different terminal service. The railroads at a certain city controlled large stock yards at their respective terminals and charged a uniform "yardage" upon live stock which entered those yards, irrespective of the length of time they stayed there. The system creating disputes with shippers, it was suddenly changed; "free yardage" was established as a custom, and the freight rates simultaneously rose by precisely the amount of the yardage theretofore demanded. Were the new rates not "determined" by the "free yardage?"

A still closer analogy is to be found in the so-called "Reading Case" (*Baxendale* v. *Great Western Ry. Co.*, 5 C. B. N. S., 336). That case arose under the "undue preference clause" and is therefore not precisely on all fours with the case at bar, but it has close analogy. Defendant acted just as our railroads afterwards did in the yardage controversy, and may, indeed, have suggested their method of action. Complainant's firm (Pickford & Co., the well known carriers) had a business which enabled them to make a handsome profit by doing their own cartage to and from stations. They used defendant's road somewhat as an express company uses one of our railroads. (See Government brief in *Wight* v. *United States*, No. 494 of this term, pp. 35–40.) In order to transfer complainant's profits to its own pocket, defendant proclaimed a system of "free cartage" at Reading, at the same time more than doubling the freight rates from London. Were the new rates not "determined" by the free cartage?

(5) *Omission, therefore, to schedule the "free cartage" makes its allowance a violation of the sixth section.*

It is admitted by one of the railroad company's witnesses in this very record that an allowance for cartage to an individual shipper is nothing but a commission to get his business. Mr. Reeve, traffic manager of the Chicago and Grand Trunk Railway, a part of the same system with this appellee (compare pp. 23, foot, 26), testified as follows (p. 29):

> Q. Has not the practice of free cartage been exactly equivalent to paying a rebate at the place of collection and delivery?
>
> A. In the way some railroad companies are doing it I believe it is, but in the way others are doing it I think not.
>
> Q. Wherein do you make the distinction?
>
> A. A railroad company that comes out and publishes that it will grant free cartage to everybody alike, I believe, makes no discrimination; but there are a number of railway companies that are only paying it to a few; they are paying it *not as cartage, but as a commission.*

In other words, it is admitted that, as between individual shippers at Grand Rapids, nominal cartage paid to one and not to another would be a commission; but it is claimed to be properly cartage when the company "comes out and publishes" it. That is exactly what we desire that this company should be forced to do, and to do in the legal way—that is, upon its official schedules.

Whether "free cartage" is in all respects a lawful custom, if publicly scheduled and not discriminating against individuals or localities, it is not necessary to discuss. In the Reading Case, *supra*, it was held illegal as

against a shipper who desired to do his own carting; and it was held that such a shipper was entitled to a freight rate, pure and simple. In other words, it was held that a railroad, if it desires to go into the carting business, must still perform its own proper business, which is carrying goods from station to station for every one who requires, at a rate reasonable and not discriminatory; and that as to the cartage business it must compete openly with its rivals. This seems eminently proper, and it would follow that cartage, when furnished at all, must be separately charged for and separately scheduled.

If, however, it be neither separately charged for nor referred to upon the schedules, it clearly operates to make the actual charge less than the scheduled charge, and thus to violate § 6.

To say that this is an extra service, rendered for nothing, is no answer. Railroads do not and can not render services for nothing. By the cost of cartage, whatever that may be, the freight rate, properly speaking, is reduced.

All this is well shown by Lord Chief Justice Cockburn in the Reading Case (*supra*, at p. 355):

> We think this argument rests upon two obvious fallacies. First, that of supposing that the whole charge in question is one made by the company in reference to their character and interests with respect to the railway, whereas in reality the charge is made by them in a character and interest independent of the railway, viz, as carriers to and from the termini of the railway. Secondly, that the company can convert that which is in reality a charge for collecting and delivering as well as for carrying

> into one for carrying only by affixing to it the latter denomination in their table of rates. * * * Again, although the legislature has conferred the power of imposing rates of charge, it has annexed to this power the obligation of imposing such rates equally, and the company can not be permitted to evade this obligation by colourably pretending that that which is in fact a charge for other things as well as for carriage is a charge for carriage only. The court is bound to look at the transaction in its true light [&c].

In that case indeed, there was no express statutory power to charge for cartage; but this can not affect the argument. The Michigan statute permitting cartage can not operate to relieve carriers of interstate commerce from charging a pure station-to-station rate, equal and public. (Compare *Gulf, Colorado & Santa Fé Ry. Co.* v. *Hefley*, 158 U. S. 98.)

Judge Cooley says, on behalf of Commissioners Morrison and Schoonmaker (p. 15):

> Nominally receiving a full rate with one hand and paying part of it back with the other, either in money or its equivalent in service, is plainly, whether so intended or not, a device that works an evasion of the law and continues a practice that is now unlawful. * * * The cartage service is a service in connection with the transportation, and is in effect an indirect rebate from the rate to the extent of the value of the cartage. It results in the carrier getting less than its tariff rate for its service, and is therefore unlawful.

(6) Questions as to compensation for deliveries upon sidings, spur tracks, etc., are not relevant to this point.

They will be considered in a different connection. There should be, of course, a special statement upon the schedules as to these charges, unless the services are to be regarded as rendered for the usual station-to-station rate, regarding each delivery point upon the tracks as a part of the regular terminal. The point, however, was not brought before the Commission, and will be considered later on.

Variations in location and extent of terminal facilities are also irrelevant here. The schedules are not intended to supply a description of the premises, but only a notice of all variations from the services customarily rendered at railroad stations and warehouses throughout the country.

II.

The Commission correctly held this free cartage to be a violation of the fourth section.

(1) *The rates charged are less to Grand Rapids than to Ionia.*

The same reasoning that shows the actual Grand Rapids rates to be an undercharge with reference to the schedules shows them to be an undercharge with reference to the Ionia rates, for the latter are scheduled at the same figures. It is unnecessary, therefore, to repeat the discussion made under our first heading.

Judge Cooley says on this point (p. 14):

> The effect of the respondent doing the cartage at its own cost of two cents per hundred pounds is precisely the same that it would be if all its rates to Grand Rapids were made two cents a hundred pounds less, and the consignees were left to pay the cost of cartage. But if that were done the Ionia

rates would clearly be illegal, because they would be two cents a hundred pounds more than the Grand Rapids rates. If, then, the argument for the respondent is sound, the same thing in substance and effect may be legal to be done one way and illegal when done in another; the form will determine its lawfulness and not its substance. So if the rates to the two towns were made the same, but the Grand Rapids consignees were allowed a rebate of two cents a hundred because of their greater distance from the railroad warehouse, the illegality would seem to be equally obvious. But this would differ from the present arrangement in form only, not at all in substance.

Judge Taft says (p. 81):

> Generally the cartage from the railway warehouse to the storehouse of the consignee is paid by him. If the railway company pays it, the expense of transporting the goods to the place where he can use them is lessened by the cost of cartage. This is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee. Now, it is admitted that this latter would be a violation of the long and short haul clause if the reduction were made at Grand Rapids and not at Ionia. Why should not its exact equivalent, the furnishing of free cartage, be also a violation? * * * Any benefit in relation to the shipment of goods having a definite money value conferred gratis by the [carrier] upon one shipper which is not conferred upon another, when the service to each is admittedly under substantially similar circumstances and conditions, is an undue reduction in the price of carriage to the former, and is illegal.

It is immaterial that terminal facilities may be made better or poorer at different localities, both through the location of the terminals and through the extent of the warehouses, team tracks, and elevators, length of business hours, etc. Such variations, incapable of being reduced to definite money value to the shipper, can not practically be brought within the long and short haul clause. The case is entirely different when some service having a definite money value and not being one of the ordinary terminal services is performed for the shipper, or when he is paid some definite amount for performing it on his own behalf. As Judge Taft says: "Terminal facilities may be varied at different stations without causing undue discrimination, provided such a variation is not such a departure from the usual facilities as to make an obvious reduction in the cost of transportation to the shipper" (p. 81). If it is such a departure, and at the same time is not an extra-terminal service capable of definite money valuation, it can be reached by § 3. If it is on extra-terminal service, however, and capable of definite money valuation, it comes within § 4 as well as § 6.

If, then, a certain amount per hundredweight were paid to every shipper in Grand Rapids for the purpose of getting his business, even if it precisely represented the average expense of cartage in Grand Rapids and were paid to cover that particular expense, it would be but a commission or rebate from the schedule rates as against the shippers at Ionia. The law deals with things, not names. That which can not be done directly can not be done indirectly. The constitutional maxim that "it is

the substance and not the form which controls" (*Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 581) is applicable as well to remedial laws. *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud.* (2 Inst., 48; Broom's Legal Maxims, 489; Endlich, Interpretation of Statutes, § 138 and auth. cit.) No rule of policy can be evaded "by a change in the form of words" (Jessel M. R. in *Bellairs* v. *Bellairs*, L. R., 18 Eq., 510, 516). A payment by a railroad company to a shipper, as above stated, whether called cartage, commission, bonus, or plain rebate, is nothing but a reduction of the freight rate for his benefit.

The furnishing of cartage is precisely equivalent in effect. There is no difference to the shipper whether the carrier charges x cents per hundredweight as freight and leaves the shipper to do 2 cents' worth per hundredweight of carting, or whether the carrier gives "free" cartage and charges $x - 2$ cents per hundredweight as freight. In the present case (apart from any motives connected with the long and short haul clause of the interstate-commerce act or with the effect on freight rates of rival roads) it was for the interest of the carrier to give free cartage instead of allowing a deduction from the freight, because, doubtless by reason of the very large business which it was thus enabled to place in the hands of the transfer company, it was able in return for its 2 cents per hundredweight to obtain not only the cartage, but a number of incidental services as well.

A cartage allowance to A in the shape of a pecuniary payment is precisely equivalent to a commission or rebate.

It is also precisely equivalent, so far as he is concerned (and the interstate-commerce act was passed for the protection of shippers), to giving him "free cartage." Things which are equal to the same thing are equal to each other. "Free cartage" is therefore a misnomer. This railroad furnishes transportation from the East to the consignee's warehouse in Grand Rapids, and the price paid therefor, although nominally a freight rate for the railroad transportation alone, is really a compensation for the whole service. It is utterly immaterial to inquire how much of the compensation should be apportioned to the service rendered between the station at Grand Rapids and the consignee's warehouse. However much it may fall below two cents a hundredweight, it diminishes the rate for services on the railroad proper sufficiently to bring that rate below the rate paid by the Ionia merchant.

(2) *The Michigan statute allowing cartage is no excuse.*

Congress, under its power to regulate interstate commerce, legislates with a view to securing uniformity of railroad freight rates throughout each of certain groups of localities. Can this legislation be affected by the question whether a given State has legislated so as to permit railroads to go into businesses which are not strictly railroad business? This is not possible. The act of Congress must have like operation in all the States. The State statute may be given effect without permitting the railroad to make it a means of evading the Federal statute by lumping its cartage charge and its freight charge together.

These considerations dispose of Judge Hammond's theory (p. 119 foot) of a combined rail and stage route from the East. He assumes that the railroad might end at Ionia and the company carry goods thence westward by wagon to Grand Rapids. Such a route, as to interstate commerce, would not be recognized by the interstate-commerce law, which deals only with all-rail and rail-and-water traffic. The law would require a uniform rate to be given to all patrons at the Ionia terminus, including those who sent their goods long distances by wagon as well as those who were near enough to bring them in wheelbarrows.

(3) *The greater distance of the station at Grand Rapids is no excuse.*

The important thing to the shipper or consignee is not the distance over which his goods are carted to the station, but the expense involved. (Compare *Harris* v. *Cockermouth Ry. Co.*, 3 C. B. N. S., at p. 711.) This expense is *precisely the same* at Ionia as at Grand Rapids (p. 12).

(4) *That Grand Rapids is a competitive point is no excuse.*

Ionia is also a competitive point. The railroad which competes at Ionia is one of the two which compete at Grand Rapids. This fact, while not expressly found, is judicially noticed by Judge Severens, as already pointed out. That it was a proper subject for judicial notice by the Commission, and was doubtless in mind when reaching their decision, there can be no doubt. A commission

of experts appointed for the purpose of regulating the railroad commerce of the country must certainly be presumed to be familiar with its railroad map. The geography of a country has always been judicially noticed by courts of general jurisdiction. (*Pegeaux* v. *Howard*, 7 Pet., 324, 342; *United States* v. *Lawton*, 5 How., 10, 26; *Hoyt* v. *Russell*, 117 U. S., 401, 404.) Judicial notice is not confined to natural features alone. It includes even blocks in cities. (*Gardner* v. *Eberhart*, 82 Ill., 316, 321.) A railroad is a *quasi* public corporation and distances by rail between cities are judicially noticed. (*Pearce* v. *Langfit*, 101 Pa. St., 507.) This involves notice of the fact that a railroad runs between them. In *Indianapolis, &c., R. R. Co.* v. *Stephens* (28 Ind., 429) the position of a railroad station was judicially noticed.

The judges are not supposed to know the geography by heart, but to refresh their memory from maps. (*Hoyt* v. *Russell*, 117 U. S., at p. 405; see *Jones* v. *United States*, 137 U. S., 202, 216; 1 Greenleaf on Evidence, 15th ed., p. 15, note.) All familiar maps now are railroad maps. It would seem, therefore, that the courts should now judicially notice the railroad system of the nation. (*Miller* v. *Railway Co.*, 83 Tex., 518; *Gulf, &c., Ry. Co.* v. *State*, 72 Tex., 404.)

"This court knows judicially that there are a number of railways besides that of defendant running into Texarkana." (*Texas and Pacific Ry.* v. *Black*, 87 Tex., 160, 165.) Even the commercial results of the railway system are noticed (*Bookman* v. *N. Y. Elevated R. R. Co.*,

137 N. Y., 302) and their general methods of doing business. (*Atchison, &c., Ry. Co.* v. *Headland*, 18 Colo., 477; *Burlington, &c., R. R. Co.* v. *Dey*, 82 Iowa, 312; *State* v. *Indiana, &c., R. R. Co.*, 133 Ind., 69; *Mason* v. *Richmond, &c., R. R. Co.*, 111 N. C., 482; *Coudrau* v. *Chicago, &c., Ry. Co.*, 32 U. S. App., 182, 186; *Mann Boudoir Car Co.* v. *Dupré*, 13 U. S. App., 183, 191.)

However this may be in other cases, it certainly must be the case when reviewing the decisions of the Interstate Commerce Commission. That body is obliged to familiarize itself with the whole railroad business of the country (§§ 12, 20) and must be intended to make use of that knowledge in dealing with particular cases. How far it is required to incorporate its knowledge in express findings, for the information of the court, may be doubtful; but so elementary a fact as the location of the railroads must certainly be knowable without being so found.

Assuming, therefore, that competition can in any case constitute a dissimilarity of circumstances and conditions within the meaning of the long and short haul clause, it is not sufficient *per se* to affect the present case, since both the cities in question are competitive points.

But the assumption is erroneous. If existence of competition at one point and not at the other is a dissimilarity, so is variance in the extent or effectiveness of competition. If these things are dissimilarities, then there are but few places, if any, where the long and short haul clause will introduce any change from the preexisting state of affairs.

If existence, extent, or effectiveness of competition is a dissimilarity, then the long and short haul clause has no application whatever when one of these elements enters into the situation in substantial degree. But the favoritism which the clause was adopted to defeat was almost invariably excused upon these grounds.

The assumption is overthrown by analysis of the language of the second and fourth sections, and examination of their history and context. It will be shown, both upon reason and authority (II, 5, 6, and V, *infra*), that the dissimilarity to take a case out of the act must be something effecting cost or risk of carriage.

(5) *The greater population and tonnage of Grand Rapids is no excuse.*

It is a familiar fact that no motive operated more strongly toward the adoption of the long and short haul clause than the grievance felt by small towns at the advantages allowed to big ones. Great abuses were believed by Congress to exist in this favoritism; and it was believed that there was no necessity whatever for making the big towns bigger and the small towns smaller by adding this discrimination to the advantages which the former would in any case enjoy. Indeed, it has been generally charged and generally believed that in many cases the increased size and tonnage of the big towns was due entirely to railroad discrimination.

Whether or not it is a little cheaper to have the business of the country centered in great cities, there is grave reason to doubt whether the political and social effects of such concentration are beneficent. No proposition

certainly is disputed with a greater weight of character and ability. It is a problem which addresses itself specially to the legislative power. Congress has evidenced a desire to check the movement toward concentration, so far as can be done through legislation, by equalizing railroad rates. In order to prevent evil effects in exceptional cases where there is controlling competition or some other insuperable obstacle to the desired adjustment, it has very wisely given a dispensing power to this Commission of distinguished experts—a power to be found in the proviso to the fourth section. Subject to this dispensing power, rates must be made no greater for the short than for the long haul when the circumstances and conditions are substantially similar.

Do variations in size or tonnage at different localities constitute a dissimilarity of circumstance or condition?

No two points on a railroad are equal in size. No two afford equal tonnage. If a difference in either of these respects is a dissimilarity within the meaning of the opening clause of the fourth section, the section is practically a nullity. No line can be drawn which will afford us a test of substantial similarity or dissimilarity. This has been already settled in the recent so-called Social Circle Case. (*Cincinnati, New Orleans and Texas Pacific R. R.* v. *Interstate Commerce Commission*, 162 U. S., 184.) That case involved a controversy between Social Circle, a little town of 2,681 inhabitants, and Augusta, a city of 33,300 inhabitants (census of 1890), the former being a point *en route* to the latter. Had substantial dissimilarity in size been a substantial dissimilarity within the meaning of this clause, Augusta would have been successful

in this court; but Social Circle was successful. The disproportion is almost precisely the same as that between Grand Rapids and Ionia.

Clearly, therefore, the size of the localities in question is not a circumstance or condition within the meaning of the fourth section. So far as it can be taken into consideration at all by the Interstate Commerce Commission in connection with the long and short haul clause, it must be under its dispensing power contained in the proviso at the end of the section, and this dispensing power should only be exercised when some special situation is shown to make the application of the section unfair.

The words "substantially similar circumstances and conditions" appear in § 2 as well as in § 4. A comparison of the former provision with § 6 shows that the phrase refers only to the conditions and circumstances appertaining to the carriage of the goods, and does not permit a difference of rates as between two individuals; in other words, that no differences in the individual situation or circumstances of the shipper or consignee constitute a dissimilarity of "circumstances and conditions" within the meaning of the "equality clause" of the statute. For all differences in freight rates must be put upon the schedules; and, when once on the schedules, must be applied equally to all patrons of the road.

This construction of the phrase as contained in § 2 is confirmed by an examination of the English authorities construing the English statutes from which our "equality clause" was substantially taken. These cases are set forth in full in the brief for defendant in error in

Wight v. *United States*, No. 494 of this term (pp. 34–57), to which we beg to refer. The corresponding phrase in the English statute ("like circumstances" or "same circumstances") "applies to the circumstances of the *carriage* and not to the trade of the consignor or the consignee" (*Great Western Ry. Co.* v. *Sutton*, L. R. 4 H. L., 226, 239); "the circumstances must be those *relating to the carriage, not to the consignor*" (id., p. 245). "In effect, I think the phrase 'like description' is exhausted upon the goods, and 'like circumstances' upon the route expense and risk of carriage, and that neither can be extended to the personal qualities of the individual who sends the goods." (Id., p. 249.) "I do not see, however, how they could relate to anything else than the conveyance of the goods." (Id., p. 260.)

If the words "substantially similar circumstances and conditions" have the same meaning in § 4 as in § 2—if they apply only to the "circumstances of the carriage" and not to the situation and circumstances of the locality where the goods are received or the locality at which they are delivered—then the size of a city and the total tonnage of its commerce are immaterial so long as they in no way affect the expense of carrying the goods. It is conceivable that a small city, on account of its comparatively small business, might permit of fewer economies in terminal service, and therefore, by its very smallness in population and tonnage, increase to the carrier the cost of terminal service. But no such claim is made, or proof supplied, in the present case; and we may therefore presume that the facts, if shown, would prove the contrary.

Is there any reason to believe that this phrase "substantially similar circumstances and conditions" is used in one sense in § 2 and in another sense in § 4; that it applies only to circumstances varying the cost of carriage in one section, while its application is more extended in the other?

It is possible that a word or phrase may be used in different meanings in different sections of the same statute. This is not infrequently the case in a codification such as the Revised Statutes of 1874, where the wording of different sections was framed by different statesmen, perhaps half a century apart. No such variance, however, should be presumed. To permit it, except when most peremptorily required in order to reach the obvious intent of the legislators, would be to establish a rule of statutory construction which would make it hopeless to the most skillful and careful draftsman to seek assurance that his intent would be fulfilled. The first five sections of the interstate-commerce act are evidently drawn with very unusual care, and words and phrases which are common to two of these sections must be given a uniform signification.

(6). *The more advantageous location of its rivals' terminals at Grand Rapids is no excuse.*

We have already endeavored to show that the appellee can not excuse its discrimination in favor of Grand Rapids by the greater distance of its terminals from the business center at that city, by the fact that the competition at that city is double the competition at Ionia, or by the fact that the city is larger and its commerce

greater. The appellee's main reliance, however, is upon the fact that the two rival roads at Grand Rapids have terminals situated one mile nearer to the average business center—one mile nearer to "the business sections of said city, where the traffic of the places tributary to respondent's road originates and terminates." This, also, is the main ground of the decision of the learned circuit court of appeals, which regards this "free" cartage service as a substitute for the spur track which the appellee could build into the center of the city were it not for "the greed of municipal authorities having control of the streets and public ways of a large city or of the private owners of city property" and similar disadvantages (p. 117, foot).

It seems to be assumed by that learned court that the expense of cartage varies in proportion to the distance traversed by the cart.

This, however, is altogether contrary to the facts; and we believe the facts to be so universally familiar as to merit judicial notice. The expense of loading and unloading, of delays at terminal points, of lying idle waiting for business, of interest on capital, rent, office force, insurance, etc., cut a far greater figure as to traffic within the limits of a city than the mere distance traversed. This is well illustrated by the fact, shown in the present record, that cartage at Ionia is as expensive as at Grand Rapids.

In a large city, indeed, questions of distance within ordinary limits are absolutely immaterial except for goods delivered in large quantities. In Washington, for instance, the expense of carrying a piece of baggage

from the Pennsylvania station to the nearest hotel is the same as that of carrying it a distance much farther than from the station to the business center at Grand Rapids.

Hence the appellee's disadvantage at Grand Rapids does not relate to small and occasional shippers, but only to shippers of large quantities, and to those only who are situated, in the business center or elsewhere, nearer to its rivals' tracks. To how large a proportion of the total business of Grand Rapids this disadvantage pertains is not shown. It was not shown to the Commission, and not satisfactorily shown to the court, whether this disadvantage extended to more than the two-thirds share of the total business which would naturally belong to the two rival companies.

The extent of the disadvantage is measured by the time and by the wear and tear involved in going and returning over the distance of one mile from the Grand Rapids station toward the business center of the city. This distance of one mile, not being in the business center itself, is presumably a distance comparatively easy for carts to traverse. The pecuniary expense of the extra carting caused by this loss of time and by this wear and tear it is impossible to estimate. It depends upon paving, grade, width, and straightness of streets, absence of other traffic to block them, etc. Clearly the main difficulties of cartage would be in the crowded business center of the city, and would be encountered by the rival railroads as well as by the appellee. Making proper allowances, doubtless a rebate of $\frac{1}{2}$ cent per hundredweight would be amply sufficient to place the appellee upon an equality with its rivals in the business center,

except as to shippers who had sidings upon its rivals' lines; and it would doubly assure to appellee a monopoly of the business of that—doubtless considerable—part of the community which is nearer to its own station.

To make this allowance of $\frac{1}{2}$ cent per hundredweight instead of the present free-cartage system would save to the appellee nearly $50,000 *per annum* upon its Grand Rapids business, assuming that it would do one-third of the east and west bound freight business, and that this business is no greater than that north and south bound—assumptions certainly within the facts. It is not clear from these figures that the excuse which prevailed with the learned circuit court of appeals is a false pretense? The figures suggest that the appellee has some other object really in mind in giving the so-called "free" cartage. Perhaps it is intended to underbid the rival railroads for the whole traffic of the city. Perhaps it is intended to reach consignees who have sidings on the rival railroads, and a part of whose freight traffic—namely, goods already sold "to arrive" to retailers or consumers, and not to go into the consignee's warehouse—could thus be diverted from its natural course. Perhaps—and we may even say probably—the old custom is maintained rather as a cover for giving to Grand Rapids a discrimination which the inter-state-commerce act would not allow.

Hence the present service, rendered to Grand Rapids and not to Ionia, cannot be defended even upon the assumption that the appellee by a proper allowance on

account of cartage could properly offset its rivals' advantages of location at the former place.

It is, however, not admitted, but strenuously disputed, that a railroad can give any rebate to the inhabitants of a particular city upon the excuse of offsetting disadvantages in the location of its terminals. To permit such a system of rebates, upon the theory that such differences in location of terminals constitute a dissimilarity of circumstances and conditions within the meaning of the long and short haul clause, would overthrow the law entirely. No two cities are alike in such matters, and it is impossible to make any distinctions which would be enforceable by courts, although such differences might under peculiar conditions contribute toward constituting a situation which would justify the Interstate Commerce Commission in exercising its dispensing power under the proviso to this section of the act.

This question also is settled by a comparison of the section in question with § 2 and with the statutes and judicial decisions in view of which that section was framed. We have already shown, under our last subheading, that the phrase "substantially similar circumstances and conditions" applies only to circumstances and conditions affecting the cost of carriage of the goods, and not to circumstances and conditions which only affect the situation of the person or locality whose goods are to be carried. In the brief for defendant in error in *Wight* v. *United States*, *supra*, it was shown that, in particular, the existence of competition does not constitute a dissimilarity of circumstances and conditions. This was shown by a comparison

with the sixth section (p. 23), by the English authorities (pp. 46–56), and by the report of the Senate committee upon which the Senate acted in adopting this statute (pp. 58–59). It was further shown (pp. 64–66) that the "circumstances and conditions" referred to by the statute are such matters as the amount of freight carried at the same time (whether carload lots or less), method of packing, speed in transportation, promptness of delivery, etc.

This also is settled by the Social Circle Case (162 U. S., 184), the facts of which are set forth at great length at the end of this brief. Social Circle was a non-competitive point. Augusta had all the advantages possible from competition. Hence, if competition could ever constitute a dissimilarity of circumstance, this was the case. The Interstate Commerce Commission held to the contrary, and its ruling was sustained. It is notable that the learned counsel for the appellee (Brief, p. 19) cites Judge Newman's opinion in that case, which was reversed.

In view of the English authorities and other considerations above referred to and fully discussed in the Wight brief, probably no difficulty would have arisen had it not been for the loose habit which commissioners and courts have alike fallen into of using the phrase "circumstances and conditions" not merely in its technical and statutory meaning, but also in a more general signification, so as to be applicable to all matters which can be taken into consideration by the Commission when acting under its dispensing power contained in the proviso to the fourth section.

It thus follows that a railroad company, if it wishes better to compete with its rivals at any given point, and if it can not obtain favorable action from the Commission under that proviso, must either build a spur track into the city, or give a rebate to its patrons there which shall apply also to all intermediate points which have the same "group rate." It is unnecessary for the Commission or the courts to enter into any "nice mathematical calculations." The railroad managers have the widest liberty of mathematical calculation, and are subject only to the restriction that the mathematics must apply to Ionia as well as to Grand Rapids.

(7.) *The old custom of free cartage at Grand Rapids is no excuse.*

This old custom is largely relied upon by the learned circuit court of appeals, who even doubt the constitutional power of Congress to break it up (pp. 117, top, 118, top).

It would seem a sufficient answer to this supposed sacred old custom that it could be destroyed at any moment by putting up the freight rates two cents per hundredweight. Certainly that learned court would not claim that the Grand Rapids shippers had a constitutional right to the particular freight rates which they were enjoying on February 4, 1887; and a custom whose value could be destroyed by a slight increase in transportation charges is not important enough to be protected by the Constitution or to have been considered by Congress. That this is not a mere imaginary suggestion is exemplified by the yardage case and Reading Case above described. (1, 4, *supra*.)

Moreover, it was not the object of the interstate commerce act to perpetuate the *status quo* on February 4, 1887. The *status quo* was regarded as full of grievances, and one of the principal grievances was the discrimination in favor of pet localities, either by direct favoritism in rating, by systems of rebates, or by other valuable bonuses such as this one of free cartage.

Judge Cooley well says (p. 13):

> It is wholly immaterial to the legal questions now raised that the business at the two towns is now done just as it was done for many years before the act to regulate commerce was enacted. If what has been and is now done works an unjust discrimination, or is in any particular obnoxious to the general spirit and intent of the act, it is an abuse, and we may assume that it was one of the very abuses which were in the contemplation of Congress when the act was passed and which were meant to be corrected. But whether specially in contemplation or not, if it would be illegal as a new practice, it is equally so as an old practice. Time might habituate the people to it and induce acquiescence, but could never, as against the express provisions of the statute, compel submission.

The learned court seemed to have overlooked the fact that a merely local custom is entirely irrelevant in construing a general statute.

"An universal law can not receive different interpretations in different towns." (Endlich on Interpretation of Statutes, § 362 and cas. cit.)

In the case of *The King* v. *John Hogg* (1 T. R., 721, 728), it was argued that the rating of John Hogg to the relief of the poor for a building called the engine house

could not be supported, because it had not been the usage in Ribchester to rate personal property. "But," the court said, "we are interpreting an universal law, which can not receive different constructions in different towns. It is the general law of the land that this kind of property should be rated, and we can not explain the law differently by the usage of this or that particular place."

In the very recent case of *Wright* v. *Gardner* (33 S. W. Rep., 622, 624), the court of appeals of Kentucky said:

> It may be said to be axiomatic that no custom may be established or maintained in opposition to an express statute of the legislature; that customs of trade may exist where they do not contravene an express statute, and when the legislature speaks, then all preexisting customs in conflict therewith must cease. Custom prevails in the absence of statute law, not in defiance of it.

(8) *The existence of a similar custom at other exceptional points is no excuse.*

Commissioners Morrison and Schoonmaker say (p. 15):

> The fact that the practice existed prior to the law, and was in use to some extent by other carriers, does not aid its lawfulness. It never was general, but at most only an exceptional practice, and its lawfulness is to be determined not by former or even present use, but by the provisions of the act.

Whatever customs were in the mind of Congress were customs uniform and definite throughout the United States. The authorities upon this proposition will be hereinafter set forth. (IV, (4) *infra*.)

Judge Severens (p. 87) seems to have fallen into a curious misapprehension in supposing that the Commission's finding as to similar cartage facilities "at exceptional stations in the State of Michigan" and other States indicates a uniformity of custom, because "by exceptional it is presumed to be understood that the conditions are similar to those at Grand Rapids, or otherwise the fact is irrelevant." The Commission undoubtedly regarded the fact as irrelevant, and inserted the finding at the request of the appellee.

(9) *No other excuse was put forward.*

The attempted analogy from services by spur tracks, sidings, etc., was first pressed when the case came before the court, and will be considered later. (IV, *infra.*)

It has been suggested that the risk at one station may be greater than at another, from surrounding extra-hazardous property; that the insurance bill on goods warehoused at the depot may thus be greater, and that this might create a dissimilarity. There is no such evidence in the present case. Hence we do not discuss the suggestion.

(10) *Assuming that the circuit court could review the Commission's action under their dispensing power, no reason is shown for action favorable to the appellee.*

It will be shown (III, 4, *infra*) that refusals by the Commission to exercise its dispensing power are unreviewable. Assuming the contrary, however, it follows from the foregoing argument that no grounds exist here for compelling the exercise of such power. The railroad

company's defense simmered down to the allegation that it was more distant than its competitors from the business center at Grand Rapids; and this disadvantage could be offset by a comparatively slight rebate which, if granted to Ionia, would be trivial in amount there, both absolutely and proportionally.

Judge Severens says (p. 87): "It is absurd to say that a common carrier is bound to supply *every little hamlet* the same advantages for the transmission and reception of freight that it does to large cities." The answer to this is that Ionia is not a little hamlet. It may well be that no cartage rebate should be allowed to a little hamlet or country crossroads, where every customer has his own cart, where the roads are very bad, and where the amount of traffic is not sufficient to warrant the keeping up of a cartage service by the railroad. If such a hamlet should lay claim to the same cartage privileges as the city of Grand Rapids and the railroad company should apply under the proviso to § 4 for a dispensing order from the Commission, the situation presented would be very different.

(11) *The fact that "group rates" have been held to be just and reasonable is immaterial.*

Judge Severens says (p. 87): "When it was held that it was consistent with the spirit of the law for the common carrier to group stations which were 75 or 100 miles apart and charge a common rate to each, the strict construction of the act was abandoned for what was thought to be a more rational one."

"Group rates" are not in violation of the long and short haul clause. Their propriety was evidently in contemplation by Congress when it provided, not that rates should be proportioned to distance, but "no greater compensation shall be received for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance."

So far as the propriety of "group rates" has any effect by analogy upon the present controversy, it is in favor of the decision of the Interstate Commerce Commission and of Judge Taft. In the railroad business proper, as in the cartage business, mere distance is a comparatively trifling element. The other elements entering into the cost of carriage and of keeping up the railroad as a going concern are of infinitely more importance. Hence, such distances as the 33½ miles between Ionia and Grand Rapids on this railroad or the 75 to 100 miles on the railroads referred to by Judge Severens are not of sufficient importance to warrant a variation in rates. For the same reason the differences in distance at Grand Rapids are not sufficient to warrant any cartage allowance at all as to part of the business; and as to the balance of the business, they are not sufficient to warrant any allowance comparable in amount to the rebate which the appellee is striving to sustain.

(12) *The appellee is subjected to no serious hardship by being held to its legal duties.*

Assuming that it has half the traffic at Ionia, and desires to make the one-half cent rebate, which is large enough to equalize its position at Grand Rapids, the extra cost involved at Ionia would be only $2,750.

(13) *The Commission's order, though not so clearly worded as Judge Taft's, was correct.*

It does not appear that either the rate of x to Ionia or the rate of x—2 to Grand Rapids is unreasonable *per se*, and apart from the question of discrimination. It would be improper unconditionally to order that one rate should be lowered or the other raised. The Commission, substantially and properly, directed that the latter rate should be raised as long as the other should not be lowered.

III.

Powers and duties of the circuit court in a suit like this.

This court has undoubtedly full appellate power over the circuit court. It seems to be supposed by many judges that the circuit court in a case like this exercises full appellate power over the decisions of the Interstate Commerce Commission, a statement to which the qualification seems to be appended by Judge Severens in the present case (p. 75), that no modification whatever can be made in the order of the Commission, which must stand or fall as a unit. We shall endeavor to show (1) that the circuit court may make such modifications of the order of the Commission as it made in the present case; (2) that it should give much greater weight to the findings and judgment of the Commission upon questions of fact than is ordinarily given by an appellate tribunal to the judgment of a court of first instance; (3) that it should require from the railroad companies a most full and complete development of their entire case before the Commission, and should refuse to

permit them to profit by their own negligence or concealment, and in particular should refuse to allow the companies to set up alleged usages which were not brought to the attention of the Commission; (4) that the court is absolutely without power in cases arising under the long and short haul clause to consider questions of competition or other matters which do not constitute dissimilarities of circumstances and conditions within the statutory limitations of that phrase.

(1) *Power to modify Commission's order.*—It has been urged in the case at bar that the order of the Commission must stand or fall as a unit, and that even the verbal modification made by the circuit court in the present case was beyond its power. This contention is based on a strict construction of §16, ignoring the provision of the same section that the court "shall proceed to hear and determine the matter speedily as a court in equity" and "in such manner as to do justice in the premises."

The modification in the present case was made only to avoid hypercriticism, and the more clearly to carry out the intent of the Commission as shown in their opinion and order. The Commission directed the appellee to stop free cartage at Grand Rapids "whereby" the sixth and fourth sections were violated (p. 16). Any desire to stop free cartage whereby no such violations of the statute would result was disavowed by the Commission in its opinion, and is not justified by fair inference from the terms of its order. As, however, such inferences were attempted to be drawn by counsel, the circuit court

changed the phraseology, and by qualifying clauses, commencing with "unless" instead of "whereby," made the construction unmistakable.

We do not argue that the court would have power to review *de novo* the evidence before the Commissioners, make findings which they have not made, and base thereon conclusions of law to which they have not come and from which they might dissent. For this reason, although there may be good ground for argument that § 3 was violated by the appellee, we make no point upon it.

(2) *Weight to be given to findings and judgment of Commission.*—The court does not sit strictly in an appellate capacity, but is bound to carry out every "lawful order." The question, therefore, is *quasi*-jurisdictional.

A difference is to be recognized between a review by an appellate court of a single judge's decision and the examination by a single judge into the question whether a decision of five experts upon a question of fact or a mixed question of fact and law was justifiable.

A decision by a court of first instance at chancery or at *nisi prius* is ordinarily made by a single judge, and by a judge presumably of less learning and experience, if not of less ability, than those who are to review him. The record upon appeal comes before a tribunal of from three to nine judges and receives the benefit of their combined wisdom. In a chancery suit or other case in which the trial judge does not see the witnesses he has only one advantage over the appellate tribunal—namely, that he is usually able to hear counsel more at length and give more minute consideration to the questions involved.

Nevertheless his opinion is presumed to be correct, and the burden is cast upon the appellant, whether he were plaintiff or defendant originally.

When the Interstate Commerce Commission, however, applies to the circuit court for an injunction in order to enforce one of its orders, and the circuit judge undertakes to review the questions of fact and law involved in the controversy, the appeal is not from one man to three or nine, but usually from five men to one, and even in this, an extreme case, an appeal from three to two. The circuit judge is presumably, perhaps, more learned in the law—even in interstate-commerce law—than the Commissioners whom he is reviewing. Even Judge Cooley, when he ceased to be a judge and became a Commissioner, is perhaps to be presumed to have lost some of his judicial learning. But upon the questions of fact, however, the Commission are presumably far more expert than the judge. The railroad system of the country, with which they have to deal, is one of great complication and of very delicately balanced interests. To understand it properly, even the wisest man must give up a large part of his time to its study.

Congress has with wisdom provided that the controversy arising under this law shall be primarily decided by a body of experts whose entire time is to be devoted to the study of this one specialty and the consideration of the peculiar problems which it involves. The appointing power, in carrying out the wishes of Congress, has constituted this body of experts with great care, selecting some from among the distinguished members of the bench or bar, others from the railroad com-

missions established by the various States. They are not forced, as is this court or the circuit court of appeals, to hear a case of vast public importance under the cramping limitations which hamper the argument of a complicated case on a crowded docket. They are not even embarrassed by the mass and variety of business which confronts a district judge. They can hear and discuss such a controversy as fully as its complication and intrinsic importance demand. The deliberation with which they proceed is illustrated by the fact that their published volumes of reported decisions average less than one to every eighteen months.

Upon every complicated question brought before it, the Commission is presumed to, and does, furnish a supply of special knowledge of the facts bearing upon the controversy and of the interests which are to be affected by its decision, which a judge, who is engaged in adjudicating the vast variety of controversies that come before a Federal tribunal, can never hope to do.

Under these circumstances we believe the following propositions to be not merely sustainable, but scarcely necessary to argue:

First, that very unusual weight should be placed by the courts upon the Commission's findings of fact; and that such findings should be supervised only to the extent of correcting such clear abuses as would warrant setting aside the verdict of a jury.

Second, that especial weight should be placed upon the Commission's findings as to the existence of alleged usages, and upon other questions of fact whose intelligent settlement requires the knowledge of a specialist.

Third, that in main the work of the courts should be confined to a review of the Commission's decisions upon questions of law, as to which the skill of the Commission is presumably less instead of greater than that of a court.

Otherwise we can never secure an efficient administration of this most important statute; for by the time that the case reaches this court, if the question be one of reasonableness of rates, the conditions may all have changed.

In the State of New York a new railroad can not be built without the permission of the railroad commissioners, whose discretion, however, is reviewable by the general term (now appellate division) of the supreme court. The principles upon which this appellate jurisdiction should be exercised have been discussed by that court in recent and interesting opinions. In *Matter of New Hamburgh R. R. Co.*, 76 Hun., 76, 78, Cullen, J., said: "The commissioners should be credited with some technical knowledge which this court is not presumed to possess." In *Matter of Amsterdam, Johnstown and Gloversville R. R. Co.*, 86 Hun., 578, 585, Herrick, J., speaks of their discretion as "a discretion enlightened and guided by their experience in the affairs of railroads, the problems of transportation, the needs of the people, together with the special facts brought before them in each particular case."

An instance of this kind of special knowledge, which such a commission must have been intended to use, is afforded by the special investigation into free cartage privileges, elsewhere described in this brief. (IV, 3, *infra*.)

(3) *New evidence in circuit court.*

A gigantic abuse has grown up in the administration of this law, and one which is bidding fair to destroy a large part of its usefulness and call forth much more radical and rigid legislation. We refer to the present methods of the railroad managers, who put in scarcely more than a "dummy" case before the Commission, and reserve their main ammunition for more effective use in the circuit court. This is a most satisfactory weapon to secure delay. The case is retried in the circuit court upon a totally different record, and the presumption in favor of the Interstate Commerce Commission's ruling it much weakened. The railroad company, moreover, is in a much better fighting position in the circuit court. Weaknesses in its proof as to alleged usages, alleged competition, and the vast variety of alleged similarities and dissimilarities which the fertile mind of a railroad manager or attorney can discover or evolve, are much more likely to pass unperceived with a judge who has perhaps never before in his life had a case arising under this law than with a Commission who are probably well acquainted with the facts upon which such allegations are based. Had they been pressed before the Commission, that body's disposition of them might have had great weight with the court; but since they were not pressed before the Commission, the circuit or district judge is obliged to proceed upon the record without opportunity to familiarize himself with the whole railroad situation sufficiently to allow him to deal with these problems with the requisite skill. It would be even an impropriety for

him to make himself an expert in railroad questions, for that would involve his neglect of other judicial business equally important.

This court, speaking by Mr. Justice Shiras in the *Social Circle Case* (162 U. S., p. 196), has had occasion to condemn the practice:

> We think this a proper occasion to express disapproval of such a method of procedure on the part of the railroad companies as should lead them to withhold the larger part of their evidence from the Commission, and first adduce it in the circuit court. The Commission is an administrative board, and the courts are only to be resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court, or when the orders of the Commission have been disregarded. The theory of the act evidently is, as shown by the provision that the findings of the Commission shall be regarded as *prima facie* evidence, that the facts of the case are to be disclosed before the Commission. We do not mean, of course, that either party, in a trial in the court, is to be restricted to the evidence that was before the Commission, but that the purposes of the act call for a full inquiry by the Commission into all the circumstances and conditions pertinent to the questions involved.

Is there no remedy for this abuse? We believe and respectfully submit that there is. If it is the "theory of the act" that "the facts of the case are to be disclosed before the Commission," then the railroad company, if it fails to make such disclosure, is violating the act and is in no position to dispute the correctness of the order. We respectfully submit that the principle of estoppel

should be applied. If the Commission were a court of equity, and the railroad company had failed to put in part of its case, it would be obliged to file a supplementary bill in the nature of a bill of review; and pending this, it would be obliged to comply with the decree. (1 Foster's Federal Practice, 2d ed., § 356 and auth. cit.)

There is only one way to make the operation of the interstate-commerce law efficient. That is to force the railroad companies to make their defense fully and fairly before the Commission. They can be forced to do so only in one way, namely, if they fail to perform this duty, to hold them estopped from trying the case *de novo* in the circuit court, and requiring them to go back to the Commission with a petition for rehearing. No irretrievable injury to the railroad companies would result from this system of procedure. The orders of the Commission are not adjudications standing for all future time. The Commission can withdraw them temporarily or finally. It stands ready at all times to rehear a controversy once decided, if the decision appears to have been based upon an imperfect view of the circumstances of the situation, for an erroneous decision in a matter of this kind may hurt not only the railroad company, but all the business of some locality, or even of the country at large.

Nowhere can this principle be more applicable than when the court is asked to find as a fact the existence of a usage not brought to the attention of the Commission. A usage must be general, uniform, and definite, as elsewhere shown, in order to affect the administration of a law. Such a usage must be presumed to have been

within the judicial knowledge of the Commission. If the alleged usage was disregarded by them, it is presumable either that they had heard the allegation and knew its falsity or that the facts relied upon before the court were so local and obscure as to deserve no attention from the law. No better example can be given than the contrast between the fragmentary evidence here produced as to the alleged usage of free cartage and the very full investigation which the Commission conducted into it.

The requirement that the court should enforce every "lawful order or requirement of the Commission," is at first sight difficult to reconcile with the privilege of taking new evidence, and with the provision that the findings of fact shall be *prima facie* evidence only. It is necessary, under familiar rules of statutory interpretation, so to construe the statute that every provision may receive effect if possible. (*Market Co.* v. *Hoffman*, 101 U. S., 112, 115–6.) This may be done by so construing it that, if the Commission's findings and the new evidence, taken together, show the "order or requirement" to have been *contrary to law*, that is, an excess of authority on the Commission's part, it shall be disregarded; but that, if they show only what the court considers an erroneous decision upon a question entirely within the Commission's province to decide, the "order or requirement" must be enforced.

(4) *Power of review as to long and short haul clause.*

It has already been shown that the long and short haul clause is rigid in its application when no substantial dissimilarity of circumstances or conditions exists; that such

dissimilarity can exist only in circumstances and conditions affecting the carriage of the goods; and that, in particular, the existence of competition, whether by rail or water, is not such a dissimilarity.

The Commission has a dispensing power under the proviso to the section, and in exercising of this dispensing power may take into consideration the existence of competition and of any other circumstance. The court, however, is given no power to review the Commission's decisions under this dispensing power, which is similar to the power of remission of fines, penalties, and forfeitures residing in the Secretary of the Treasury. Congress would have acted unwisely and unfortunately if it had rested so delicate a power in a purely judicial body It could only be exercised by specialists whose functions partake of an administrative nature.

The existence of thoroughly effective competition of such extent as to require special interposition (and such interposition was evidently within the contemplation of Congress only in very exceptional cases) has always been regarded by the Commission as constituting a sufficient ground for relieving the carrier from the operation of the long and short haul clause. In its very first decision (*In re Louisville and Nashville R. R. Co.*, 1 Int. C. C., 3) the railroads were relieved from the operation of this clause in all cases where they were met with effective water competition or with effective competition from lines not subject to the interstate-commerce act.

It will be borne in mind that the power of the court is not strictly appellate in nature. Its duty is to enforce

a "lawful order or requirement of the commission." (§ 16.) This language excludes all review of discretionary rulings.

IV.

The new evidence presented to the court in this case did not warrant a reversal of the Commission's decision.

(1) *No new evidence was produced bearing upon the sixth section.*

(2) *The only really new evidence introduced with a view to the fourth section was in respect to the alleged usages as to free cartage and as to spur tracks, sidings, etc.*

The element of competition is now removed from the case. The fact that competition may be greater in effectiveness at Grand Rapids than at Ionia addresses itself to the dispensing power of the Commission, and is not a dissimilarity of circumstances and conditions cognizable by the court. (III, 4, *supra.*) The evidence upon this point is a little fuller, but does not materially alter the situation as it appeared to the Commission, except that the disadvantages at Grand Rapids now appear to be due to the appellee's lack of foresight, its terminal location there having been selected nearly forty years ago, and business having moved away from it (p. 72).

The testimony to the effect that the free-cartage custom is beneficial to Grand Rapids and tends to equalize land values and give everybody an equal opportunity is neither new nor material. It is an eminently proper privilege, provided that it be given the requisite publicity, so that everybody in Grand Rapids may receive

legal notice that he is entitled to it; provided a proper allowance be made to persons who do their own carting; and provided that it be extended to Ionia and such other points included in the same "group" as may not be excepted by the Commission under its dispensing power.

The fact that the appellee is enabled by this cartage system to make certain small economies is likewise immaterial. It may be presumed, in support of the order of the Interstate Commerce Commission, that similar economies could be secured by similar action at Ionia. The burden was upon the appellee to show a substantial dissimilarity of circumstances and conditions. It is not sufficient to prove the circumstances and conditions at Grand Rapids. In order to establish dissimilarity, the circumstances and conditions at Ionia must also be shown.

It is obvious that no substantial dissimilarity exists. The economies effected by means of this free-cartage system are comparatively trivial. The freight traffic to and from Grand Rapids by all roads in 1887 amounted to 985,685 tons. Assuming that the appellee, through its free-cartage system, gets its share of the east and west bound traffic at Grand Rapids, and that this traffic is one-half of the whole (both assumptions doubtless far within the truth), its traffic amounts to about 165,000 tons, upon which the cartage is $72,000 per annum. It saves simply the expense of soliciting freight, collecting the freight rates, and sending notices of receipt of freight—in other words, it saves the salaries of a few employees who would otherwise have their headquarters at its passenger agency in the city. It is evident that

this is no saving sufficient to justify the discrimination made. A saving of this kind is, indeed, altogether immaterial when it does not equal the amount of extra expense incurred. The rebate given to Grand Rapids and denied to Ionia is certainly not justified by the fact that it costs the appellee only, say, $x - \frac{x}{10}$ instead of x.

(3) *No usage sustaining free cartage was or could be made to appear.*

Indeed, to contradict the Commission on this point would be a breach of appellee's own stipulation (pp. 11, 12) by which it is bound.

That the Commission's finding as to the exceptional character of such alleged usages was sustained by their independent information, as well as by the stipulation of the parties, is shown by their investigation of the question made while this case was pending before them, and reported as follows in their annual report of 1889 (3 Int. C. C., 309–10):

> On the 17th of June most of the leading railroads, 585 in number, were summoned by circular to furnish the Commission with information with regard to free-cartage delivery of freights, and to have their answers duly verified by some officer of their companies with knowledge of the facts. They were required to state at what stations on their lines they made free-cartage delivery, if any, and of what class of freights; whether such stations, or any of them, were grouped with any other station or stations on their lines at which the same transportation rates were charged as to like freights delivered with free cartage; how long the system of free-cartage delivery

of such freights had been made; what its origin, and all the facts, circumstances, and conditions, if any, that induced it to be done; whether it resulted in competitors making free-cartage delivery at the same station; what effect, if any, such free cartage had upon rates at such stations as compared with rates at other stations; whether their rate sheets of tariffs made any, and what, reference to free cartage where it existed; what estimate they made of the actual cost of such free cartage at the stations where it was done. 463 companies responded to this circular. By the answers it received it appears that 65 railroad companies allow free-cartage delivery of freight, or equalizing cartage allowances; that 389 railroad companies do neither; that 7 railroad companies only deliver free to connecting lines freight shipped on through tariffs, and that 2 railroad companies only switch cars free to mills and manufactories.

It further appears by these returns that no company furnishes free-cartage delivery at all its stations, but, as a rule, only at few stations; that in some instances when free cartage is furnished at a station by one company competitors do the same, but it does not appear that that is generally done; that in no instance do the rate sheets or tariffs give any information about free-cartage delivery; that the estimated cost of free-cartage delivery will average about $2\frac{1}{2}$ cents per 100 pounds; that where allowance is made for switching on connecting tracks to consignees' doors, or where an allowance is made per car to equalize distance from shippers' doors to depot, the average cost is about $2 per car, or $2.50.

As a case is pending before the Commission involving the lawfulness of free-cartage collection and delivery of freight, no further comment is made on this subject.

These statistics were collected in pursuance of the legal duties of the Commission, which was entitled to use them, because they had become part of its *quasi*-judicial knowledge as a board of experts. This court would seem entitled to examine the statistics, because, by incorporation in an official report, they have become matter of public knowledge, as well as because, in reviewing a decision of a board of experts, it is entitled to consider everything which the board could and did consider.

(4) *No uniform and definite usage regarding sidings, etc., is proved.*

The appellee's contention is that there is a custom, all over the country, of giving sidings to all persons at competitive points who are situated either on the main tracks or on belt lines or spur tracks, and who will furnish the land for them, and of making free deliveries on these sidings; and therefore that free cartage may be given at any locality in lieu of the spur tracks, belt lines, and sidings which the company might otherwise construct.

It is necessarily to be contended that this alleged usage is so general, uniform, and definite as to have been presumably in the mind of Congress.

It will be argued under our next subheading that, assuming there to be a uniform and definite custom in this particular, it has no bearing upon the present controversy.

We shall endeavor first to show that the custom is not sufficiently established and that the practices of railroad companies with relation to siding privileges, as disclosed

by this record, constitute a glaring abuse which itself needs rectification.

That a custom, to be presumed to have been within the mind of Congress and to affect the meaning of a statute, must be uniform, general, and definite, hardly needs citation of authority.

The most recent application of the general rule by this court is by *Maddock* v. *Magone* (152 U. S., 368, 371), and cases following it, to usages of commercial language, the court holding that—

> Such usage, to affect a general enactment, must be definite, uniform, and general, and not partial, local, or personal.

The principles governing the effect of usages in the construction and application of statutes are the same as those governing their effect in the construction and application of contracts, with this exception: That individuals contract with reference to local usages, while Congress can not be presumed, in legislating for the whole country, to know them or take care for them.

The following were among the cases cited by the undersigned in *Maddock* v. *Magone*, *supra*, as establishing the principles which the court endorsed in its opinion: *Garrison* v. *Memphis Insurance Co.*, 19 How., 312, 317; *Collings & Co.* v. *Hope*, 3 Wash. C. C., 149; *Schurr* v. *Savigny*, 85 Mich., 144; *Foye* v. *Leighton*, 22 N. H., 71, 76, and cas. cit.; *Butler* v. *City of Charlestown*, 7 Gray, 12, 16; *Rapp* v. *Palmer*, 3 Watts., 178; *Citizens' Bank* v. *Grafflin*, 31 Md., 507, 520; *United States* v. *Buchanan*, 8 How., 83, 102; *Adams* v. *Pittsburg Ins. Co.*, 76 Pa.,

81–411. The following citations may be added: *Baltimore Base Ball Club* v. *Pickett*, 78 Md., 375, 386; *Rindskopf* v. *Barrett*, 14 Iowa, 101, 105; *Foley* v. *Woodside*, 6 Md., 37, 50; *Sterling* v. *House*, 25 W. Va., 64, 96; *Randall* v. *Smith*, 63 Me., 105, 106; *Sweet* v. *Leach*, 6 Ill. App., 212; *Wood* v. *Wood*, 1 C. & P., 59.

In *Bowling* v. *Harrison*, 6 How., 248, 259, Mr. Justice Grier said:

> A usage to be binding should be definite, uniform, and well known.

In *Rapp* v. *Palmer*, *supra*, the court said:

> To take a case out of the operation of a general principle, a usage should have every requisite to give it validity. It must be ancient, certain, uniform, and reasonable.

The most general custom with relation to private sidings or switch tracks seems to be that they should be permitted at competitive points, when the shipper furnishes the right of way. But this is irrelevant, because Ionia is a competitive point as well as Grand Rapids; and it is also not a uniform custom.

Mr. Atwater, the superintendent of this road, simply says that, whenever the shipper will furnish the right of way, and in exceptional cases pay a part of the cost of construction, "it is very often done;" that it is "usually the case at competitive points, not so much at other points;" that, whether the point is competitive or not, "in some cases on our road the shipper pays for the siding;" and that when the point is not competitive, the shipper does not always pay for the siding, but does "in some cases" (p. 42).

When the sidings are once built, Mr. Atwater testifies that it is "a general practice" to deliver freight over them free of charge (p. 40); so that practically the owner of the industry provides access for the railroad company, and in consideration of that the cars are put on the track free (p. 43).

Mr. George B. Reeve, an officer of the Grand Trunk system and a former officer of this particular member of it, gives more definite information upon the question of uniformity. Being asked whether the switch tracks "are usually constructed partially at the expense of the owners of the business places," he says (p. 30):

> A. Sometimes they are. I should say perhaps 25 per cent were constructed by the owners of the business places and 75 per cent by the railroad companies.

Mr. Loud, the traffic manager of the appellee, testifies: "As a rule the party wanting the siding, I think, furnishes the right of way; but there are exceptions" (p. 57).

The custom of free delivery at these sidings in case of carload lots is very general, for the reason, familiar to everyone who has studied the subject, that it is a saving to the railroad company. It is cheaper to switch the car onto the siding, leaving it to be unloaded by the owner of the goods, than to perform the ordinary terminal services. Judge Severens on this point (p. 88) is clearly misinformed. This custom of free delivery is not as broad, according to Mr. Atwater, as the appellee's "free cartage," because it is generally restricted to carload lots (p. 43). This is so, "as a rule," according to Mr. Loud (p. 58).

Mr. Reeve, though an officer of the same system, has quite the contrary impression. He says (p. 30):

> A. Carload and less lots? I don't think so. I think if we had a siding into a factory on our road we should deliver all their goods, whether carloads or less lots, right on that siding. I think that is the universal custom.
>
> Q. That is the universal custom of the roads you represent?
>
> A. Yes, sir; and of roads I don't represent.

Mr. Loud admits that it is sometimes done from motives of favoritism (p. 60):

> What I mean is that in some instances freight in less than carloads is switched from manufactories to depots as a favor, but it is not the rule.

Mr. McQueen, who had been for over 20 years an employee of the appellee, but had just left its service, gives some interesting testimony bearing on this point. He was questioned as follows (p. 48):

> Q. The business which is delivered free of switching charges, upon switching or business tracks, is business that is transported in carload lots, is it not?
>
> A. Not always.
>
> Q. Well, as a general rule?
>
> A. In consideration of the volume of business, it is practically so.
>
> Q. And the business that goes onto switching tracks or business tracks in carload lots is loaded or unloaded, as the case requires, by the consignor or consignee, is it not?
>
> A. I presume so, because the railway companies are not supposed to have their men on sidings or tracks.

Q. You know so, don't you?

A. There may be exceptions to it.

Q. There are exceptions to all general rules, I believe, and that is especially true of railroads where there is sharp competition, isn't it?

A. Yes, sir.

Q. They do all sorts of exceptional things?

A. Well, I should want to qualify that somewhat.

Q. Well, a great many exceptional things?

A. I presume so.

Q. I mean things out of the ordinary course?

A. I mean things that some people might take exception to.

Q. What I mean is, they make exception to the general rules upon which they act?

A. There is no rule that is not broken at some time.

Q. Do you know anything about the conditions upon which these business tracks are usually constructed?

A. Only in a general way.

Q. They are generally constructed, when they leave the right of way of the railroad company, upon rights of way furnished by the owner of the business?

A. Generally, unless the siding happens to be entirely on the railway company's property.

Q. But ordinarily such a track runs off the right of way of the railroad company, doesn't it?

A. In many cases; yes, sir. There are a great many industries, however, located right on the line.

He further says (p. 49):

Q. It is very seldom that any railway company delivers upon switching or business tracks in less than carload lots?

A. It has been done. I don't know what percentage of it.

Q. It is very exceptional, isn't it?

A. I could not say as to that.

Q. It is not considered legitimate, to use your term, is it?

A. Hardly.

Referring to the appellee's business, he says (p. 50):

> It has been necessary, in my experience at Grand Rapids, for them to put cars with small lots of freight alongside of these very parties' doors.

Hence, assuming that free cartage would be justified if there were a uniform and definite custom, presumably known to Congress, that property owners adjacent to the tracks might have private sidings built and goods delivered thereon, the appellee has failed to prove the necessary definiteness or uniformity. Some can get sidings given to them by the company, while others have to pay for them themselves. Some can get deliveries only in carload lots, while others can get them in small quantities. The distinctions depend not upon any natural line of distinction, but upon the favor of the railroad company.

It is the siding system itself which needs reforming. If any man can get a siding who will give the right of way, every man should be able to get it on the same terms. If the railroad company is willing to contribute x dollars toward any man's siding, it should be required to contribute x dollars to every man who wants a siding. If it delivers less than carload lots to A, it should deliver likewise to B.

(5) *Assuming there to be a custom having the effect of law, to give free delivery of carload lots upon sidings, etc., it has no bearing upon the present controversy.*

It is not claimed in the record (although erroneously so supposed by Judge Severens) that these deliveries are an expense to the carrier. On the contrary, as above remarked, they are well known to be a saving of expense. The custom thus assumed would be equivalent to an extension of the company's local terminus in consideration of this saving. The terminus, instead of including simply the freight and passenger stations and adjoining tracks, would include also all sidings along its tracks at the same locality.

Under such a custom, every individual patron of the road in any given locality, whose land was adjacent to the tracks, and who was willing to give sufficient land for a siding and pay the amount required by the company from every patron for construction and maintenance, would be entitled to have it, and to have free deliveries upon it.

As between different localities, individuals similarly situated at each would be entitled to similar privileges, unless there might exist some ground for preferring one locality over another under § 3—a question not here considered.

The custom, if it exists as to carload lots, is good at Ionia, as at Grand Rapids. It is not shown not to exist at Ionia. Whatever analogies may arise from it are as applicable in the one city as in the other. There can be no analogy, however, between such a custom and a general system of free cartage, because the former applies

only to adjacent property owners and is a saving to the company, while the latter applies to a whole city and is an expense.

As to amounts less than carload lots, there is concededly no general custom of free delivery upon sidings, and hence there is no basis for reasoning by analogy.

(6) *Spur tracks and belt lines are altogether immaterial to this controversy.*

Spur tracks and belt lines are extensions of the general line of railroad. Of course an individual factor, or a large establishment in a sparsely settled locality may find it profitable to furnish the right of way and pay for the construction and maintenance of a spur of miles in length. This, however, would not be a spur track or belt line within the meaning of the present record, but an elongated private siding. For practical reasons it could not exist in a large town. Real estate is too valuable; and if the intermediate landowners were unwilling to sell a right of way voluntarily, it could not be procured by eminent domain for the accommodation of any private industry, no matter how important and extensive. (*Matter of Niagara Falls & Whirlpool R. R. Co.*, 108 N. Y., 375.)

It is thus impossible to make spur-track and belt-line service equivalent to free cartage. It can operate only to extend station accommodations by multiplication of private sidings, and to improve the location of the railroad terminus or termini.

As already argued, it is impossible to make an accurate mathematical estimate of the difference in respective value

of the terminal locations of the various railroads in a given city. A railroad company which feels that it is at a disadvantage has two remedies—first, to build a spur track; or, second, if that is too expensive, to make an approximately compensatory reduction in its freight rate, which involves an equivalent reduction to all localities which have a right to demand it under § 3 or § 4.

V.

The Supreme Court authorities.

The undersigned has already discussed, in the Wight brief above referred to, the various authorities in this court bearing upon the interstate commerce law. It is proposed to restate them very briefly.

It is assumed that the actual decision in each case, and the rulings therein necessarily involved, constitute its binding authority, and that the words employed in the opinion stand subject to correction. (*Cohens* v. *Virginia*, 6 Wheat., 264, 399; *Carroll* v. *Lessee of Carroll*, 16 How., 275, 286; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, 574.) We cite these authorities on account of the stress which has sometimes been put upon the use of the words "circumstances and conditions" in opinions of the courts as well as in those of the Interstate Commerce Commission. A large share of the difficulty in logical processes, whether in philosophy, ethics, law, or elsewhere, comes from ambiguity in terms used. The ambiguity in this term "circumstances and conditions" has already been pointed out. They have a very general meaning in the vernacular, which is applicable to differences in nature and extent of competition between

railroads as well as to differences in matters affecting the cost or risk of carriage.

Differences affecting cost or risk of carriage alone, however, are cognizable under the words "for the transportation of passengers or a like kind of property under substantially similar circumstances and conditions" in § 4. When, therefore, the phrase "circumstances and conditions" is used by Commission or court with reference to § 3, or to questions arising under the proviso to § 4, while its use may very properly relate to questions as to extent of competition or other differences in situation not affecting cost or risk of the carriage between rival localities, it must be borne continually in mind, in order to avoid perplexity and confusion, that the words are being used in a sense wider than that of the statute. It is believed by the undersigned that much of the difficulty in these cases has come from failure to distinguish the stricter definition of the phrase in §§ 2 and 4.

The Social Circle Case is the only one so far decided by this court which arose under the long and short haul clause. The other cases which will be referred to either arose under § 2 (where, however, the same phrase "circumstances and conditions" is used in the same sense) or have a still more distant bearing.

Union Pacific Ry. v. *Goodridge*, 149 U. S., 680, arose under a provision of the Colorado act, which corresponds to § 2 of the Federal act. It is of interest here only in so far as it states the object of such legislation (p. 690):

> This act was intended to apply to intrastate traffic the same wholesome rules and regulations which Congress two years thereafter applied to commerce between the States and to cut up by the roots the

> entire system of rebates and discriminations in favor of particular localities [&c.].

Judge Severens, therefore, in omitting to notice the element of discrimination, omitted the most important object of the law. (Record, p. 84).

Atchison, Topeka & Santa Fe R. R. v. *Denver & New Orleans R. R. Co.*, 110 U. S., 667, arose under provisions of the constitution and laws of Colorado, some of which have some similarity to provisions of the Interstate Commerce Act. It was decided early in 1884. The only point of the decision, however, is that those laws do not require a railroad company to establish a station for the special accommodation of a particular customer (in this case another railroad company) or to join with another company in doing a through business.

Missouri Pacific Railway Co. v. *Nebraska*, 164 U. S., 403, arose under a Nebraska statute very similar to the interstate commerce law; and resembled the case just cited in that it was brought in an attempt to enforce the establishment by the defendant railroad company of a special terminal facility for the benefit of a single customer or group of customers. The Nebraska supreme court held that the law sustained plaintiff's contention; and this court then held that the law as so construed violated the Fourteenth Amendment to the Federal Constitution. The case would be in point if, there being no usage permitting sidings to persons having property along the tracks, some single individual should apply to the courts for a private siding, alleging that the terminal facilities of the road were insufficient. The case would not be in point if a similar application were made in a

locality where sidings were furnished to favored individuals; it would not be applicable, that is to say, further than to require that the relief given by the court upon such an application should be conditioned so that the company would have the alternative of giving the desired facility to the applicant, or else withdrawing it from his favored rivals.

A group of interesting cases establishes a distinction between local traffic and through traffic, showing them not to be traffic under "substantially similar circumstances and conditions."

Union Pacific Railroad v. *United States*, 117 U. S., 355, 363, arising under a statute not *in pari materia*, is of interest only because it holds these two kinds of traffic not to be "the same kind of service."

The so-called "party rate case" *(Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S., 263) holds simply that the carriage of passengers in companies of ten or more is not "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" with the carriage of the same number of individuals travelling separately. This case simply applies to passenger traffic the analogy of the never-disputed principle of freight traffic, that charges may be reduced when articles are carried in carload lots. The court also points out (p. 277) that a return passenger ticket need not be sold for double the price of the ticket one way; also (p. 284) that the English cases under the undue preference clause "may justify contracts which with us would be obnoxious to the long and short haul clause of the act."

Texas & Pacific Railway v. *Interstate Commerce Commission* (162 U. S., 197) has been much cited, and, as the undersigned believes, much misunderstood. That suit was based upon § 2 (the equality clause) and upon § 3 (the undue preference clause). The opinion, while holding that the acts complained of did not fall within the prohibition of either section, did not discuss them separately in their application to the facts of the case. The long and short haul clause did not apply because the suit did not relate to any controversy between different localities in the same country, but raised the question whether the rates from New Orleans to San Francisco must be the same for imported goods as for domestic goods of the same class. The imported goods were shipped from Europe *via* Cape Horn on through bills of lading (p. 216)—"joint rates from English ports to San Francisco" (p. 221).

The undersigned understands the bearing of this case, upon the various sections of the act, to be as follows:

To come within the equality clause of § 2, it is necessary that the transportation be "of a like kind of traffic," and that the service be "like and contemporaneous." Through and local traffic had already been held in the Union Pacific Case, *supra*, not to be "the same kind of service." This alone is sufficient to dispose of the second section; although it would seem to follow also from the Party Rate Case, *supra*, that through and local traffic are not "under substantially similar circumstances and conditions," and this would seem to be clear, since the dissimilarities between through and local traffic relate to the carriage itself and to its cost. A contrary construc-

tion indeed would, if carried to its logical conclusion, end all reductions in through rates.

The main question, therefore, arose under the "undue preference clause" (§ 3), and the opinion of Mr. Justice Shiras is mainly devoted to the discussion of questions arising under that clause. The English cases so fully cited are cited with reference to their bearing on the undue preference clause of the British act of 1854, from which our § 3 is taken. The words "circumstances and conditions" are not to be found in § 3; and although they are used in this opinion, as well as in many opinions of the Commission and courts which deal with this section, they are not used in the limited application to which their history and context restrict them in § 2 and § 4. Competition is a proper element for consideration under § 3, as it is under the proviso to § 4. This court considered that the ocean competition around Cape Horn was sufficient to warrant the preference in rates given to goods imported upon through bills of lading.

The cases above referred to, therefore, do not affect the long and short haul clause further than by implying the rule that its prohibitions would not prohibit a discrimination in favor of through as distinguished from local traffic, a distinction already taken in *Chicago & Northwestern Ry. Co.* v. *Osborne*, 10 U. S. App., 430, a writ of *certiorari* from which decision was denied in 146 U. S., 354, the application being premature, and this rule is subject to the limitation, of course, that the total through rate shall not be less than any local rate over a portion of the through line. (Report of Interstate Commerce Commission, 1892, pp. 31, 32.)

The so-called Social Circle Case (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184) was argued with very great ability, and probably the brief filed on behalf of the railroad company is without a superior for clearness and force. So far as this decision was based upon the railroad company's appeal, it relates solely to the long and short haul clause, and is, as above stated, the only decision of this court upon that provision of the statute.

The question was whether the relative importance of Social Circle and Augusta, and the competition between Cincinnati and Augusta by lines not competing at Social Circle, justified the railroad in charging less to Augusta than to Social Circle, although the latter was 119 miles nearer to Cincinnati, and on the same line.

The case is notable for the following reasons:

First. The relative population of the two towns in question is almost precisely the same as here, namely, 2,681 for Social Circle and 33,300 for Augusta.

Second. Social Circle was not even, like Ionia, a competitive point in lesser degree than its opponent. It was not a competitive point at all.

Third. Augusta was a competitive point in a far higher degree than Grand Rapids, having water communication with the ocean.

Fourth. Augusta, unlike Grand Rapids, had been an important distribution point before the days of railroads.

Fifth. The relative size of Augusta and its history and present importance as a competitive point were relied upon by the railroad company. The railroad company insisted upon the argument that the existence of compe-

tition takes every case, if it takes any case, out of the main provision of the long and short haul clause (as, *e converso*, we rely here upon the proposition that competition can take no case out of that provision now that it has been held that Augusta, as against Social Circle, was not taken out of it).

Sixth. The railroad company was unsuccessful, and the operation of the long and short haul clause was sustained.

Seventh. The case is therefore authority precisely in point (although not distinctly so stated in the opinion) in favor of our construction of this important statute.

The situation of Augusta is described as follows in Mr. Baxter's brief for the railroad company (p. 29):

> Augusta is situated on the Savannah River, which is navigable for steamboats from the ocean, at the city of Savannah, to Augusta, usually, during the entire year.
>
> The Central Railroad, from Savannah, the Port Royal and Augusta Railroad, from Port Royal, and the South Carolina Railroad, from Charleston, run from the seacoast to Augusta.

The competition by rail and ocean between Cincinnati and Augusta, *via* New York and more northerly ocean ports, was a potential factor in fixing rates. Though the movement was now small, on account of the rail rates, it had been considerable, the steamers carrying goods southward very cheap rather than to go in ballast (pp. 29–31).

There was also present effective rail competition by lines reaching Augusta *via* Macon or *via* Paint Rock, not passing through Social Circle (pp. 33, 34).

There was also competition with Eastern markets, which supplied the same goods as those of Cincinnati.

The history of Augusta and of Social Circle is set forth by Mr. Baxter as follows (p. 102):

> Augusta was laid out as a town, upon the Savannah River, in 1735, under a royal charter.
>
> Several warehouses were built and stocked with goods suitable for the Indian trade. Boats were used for transportation, and they made four or five voyages annually to Charleston.
>
> Augusta soon became a great mart for trade, superior to any in South Carolina or Georgia. The annual fair of the Indian traders was held there, and it was attended by many of the Indian tribes. It was computed that over two thousand pack horses and six hundred men annually visited the place. * * *
>
> Before the Georgia R. R. was built, freight from Cincinnati was carried down the Ohio and Mississippi rivers to New Orleans, and thence by ocean to Savannah, and thence by river to Augusta. From Augusta it was hauled in wagons to Social Circle, 119 miles, at a wagon rate that amounted to about $1.20 per 100 pounds for that distance.
>
> We see that in those early days the "preference or advantage" in favor of Augusta, or the "discrimination" against Social Circle, was four times as great as it is now; the present difference in rates being only 30 cents per 100 pounds.

The present relations of the two localities, as claimed by the railroad company, are set forth as follows (pp. 103–4):

> The completion of this rail route from Atlanta to Cincinnati had the effect to change the relative geographical relation which had previously existed between Social Circle and Augusta with respect to Cincinnati, so that Social Circle became geographically nearer than Augusta to Cincinnati; and, had

there been nothing else in the case, Social Circle would have become equitably entitled to lower rates than Augusta.

But Augusta can purchase first-class freight in Baltimore, with a rail-and-water rate of only 89 cents per hundred pounds, or, with an all-rail rate of only 96 cents per one hundred pounds, from there to Augusta. * * *

The geographical relation now existing between Social Circle and Augusta, with respect to Cincinnati, is of no consequence, so long as Augusta can use Baltimore as a base of supplies. The question is one of strategical rather than of geographical relations; and Augusta still has a better strategical position than Social Circle can possibly attain.

Social Circle did not claim that there was any unjust discrimination or undue preference against it under the second and third sections (p. 107). Its claim was based solely upon the fourth section and upon the fact that the Interstate Commerce Commission had failed to relieve the railroad company from its operations. The position which the Interstate Commerce Commission has taken before the intermediate appellate court is stated as follows by Mr. Baxter (p. 111):

Counsel for the Commission argued in the court of appeals, and they may repeat the argument here, that under the 4th section of the act to regulate commerce as finally passed, a carrier can in no case of competition lawfully charge more for a shorter than for a longer distance, unless he shall have previously obtained the permission of the Commission. Their argument was that even competition by water will not justify a carrier in making a greater charge for a shorter than for a longer distance, unless the permission of the Commission be previously obtained.

Mr. Baxter then argued, as we have argued, that the meaning of the words "under substantially similar circumstances and conditions" was the same in the fourth as in the second section; citing to that effect the remarks of Senators Allison and Harris in debate (p. 120), and all the decisions and *dicta* of circuit courts which have been so much relied on by the railroad companies in these cases. Mr. Baxter then proceeds to set forth the first decision of the Interstate Commerce Commission (*In re Louisville & Nashville R. R. Co.*, 1 I. C. C., 3), in which the Commission (contrary to the law, as understood by us, and inconsistently, as claimed by Mr. Baxter) ruled that water competition or competition with foreign railroads or with railroads wholly within a single State might make a dissimilarity of circumstances and conditions within the meaning of the opening clause of the fourth section; although (*In re Cincinnati, Hamilton and Dayton R. R. Co.*, 6 I. C. C., 323, 326) this was contrary to the general understanding of the bar at the time. Competition of interstate railroads was held to be generally no dissimilarity. Mr. Baxter forcibly pointed out this inconsistency, and clearly showed that competition, if introducing a dissimilarity in any case, introduces it in every case (p. 124):

> What good reason can possibly exist for such a distinction between water and rail competition? And what good reason can possibly exist for the distinction between different kinds of railroads?
>
> Water transportation is generally cheaper than railroad transportation, and therefore water competition generally forces lower competitive rates.
>
> This, however, is a mere difference in degree, and is unimportant.

> The important fact is that a competitive rate must be met, whether it be made by water craft or by railroad. It is the fact of competition, and not the kind of competition, that creates the substantial dissimilarity in the circumstances and conditions of transportation.

In answer to the contention that while the Louisville and Nashville decision had been to some extent erroneous, its error consisted in the recognition of competition in some cases, not in the refusal to recognize competition in other cases, Mr. Baxter attempted to enforce the doctrine of estoppel against the Government based on the erroneous decisions of its officers (p. 129):

> For a period of nearly seven years we have repeated decisions by the Commission, acquiesced in by Congress, that competition by water, competition with a foreign railroad, competition with a road wholly within a single State, and "rare and peculiar cases of competition between railroads subject to the statute," may be considered in ascertaining the circumstances and conditions under which transportation is conducted, and we submit that it is now quite too late for either the Commission or its counsel to undertake to repudiate a principle which has been so long recognized.
>
> The Commission was right as far as it went. It committed an error in not going far enough, and in attempting the impossible task of drawing a sound distinction between the different kinds of competition, as affecting transportation.

This argument, it is hardly necessary to point out, is somewhat incongruous in coming from counsel who was himself insisting upon the erroneousness of the decision, and was contrary to the general rule that the Government

is not bound by the legal action or inaction of its officers. (*Wisconsin Central Railroad* v. *United States*, 164 U. S., at p. 210.)

Messrs. Hammond and Edmunds in their argument (pp. 58 et seq.) took the same ground on behalf of the Interstate Commerce Commission with respect to the applicability of the phrase "substantially similar circumstances and conditions" to competition, holding that all competition was a dissimilarity if any competition was, and *vice versa;* and formally abandoning the doctrine of the Louisville and Nashville case. (Supplemental Argument, pp. 13, 14.) They differed from Mr. Baxter in maintaining that no competition was a dissimilarity.

The Supreme Court, in affirming the action of the circuit court of appeals and of the Commission, must necessarily have held that this very strong case of competition, both by rail and by water, did not constitute a substantial dissimilarity of circumstances and conditions, and that, if it were to affect the long and short haul clause at all, it must do so by constituting a "special case" within the meaning of the proviso thereto appended. The decision must be held conclusive upon the construction of the long and short haul clause, both for the reason that all competition must be excluded, if any, as shown by Mr. Baxter, and for the reason that no greater dissimilarity as to "strategical position" could well be found, than that between Social Circle and Augusta.

It is now claimed by Mr. Baxter, in a brief just filed in the Alabama Midland case (No. 563 of this term), that the Social Circle case did not altogether exclude competition from the opening clause of § 4, but only requires

that the competition shall be such *as affects rates;* that competition affecting rates is a dissimilarity within the meaning of that clause; that whether or not competition affects rates is a question of fact; and that the decision, so far as it was an affirmance, turned only on a question of fact.

This theory is ingeniously based upon the use of a *dictum* in another case—the remark in the Texas Pacific case that "competition that affects rates" is "among the circumstances and conditions to be considered" (162 U. S., at p. 233). But the court was there evidently speaking with reference to the undue preference clause, as above pointed out (p. 87, *supra*); and hence had no need to use the words "circumstances and conditions" in their restricted statutory application under the long and short haul clause.

On the contrary, it was incontestable that at least one element of competition existed in the Social Circle case which actually was affecting rates, namely,—the element of competition "between market and market." However potential the various competing routes between Cincinnati and Augusta may have been, there was clearly competition between the manufacturers of Cincinnati and those of the northeast for the trade of Augusta; and the latter got the benefit of water freight rates. The evidence before the Commission on this point was considered by them to be insufficient; but the defects were fully supplied when the case was brought into court, and the claims of Mr. Baxter that the competition affected, and indeed controlled, the Cincinnati-Augusta rates, seem to have been uncontested by the Commission's counsel.

The question thus arose, whether competition between market and market is a circumstance or condition within the meaning of the long and short haul clause. That it is, if any competition is, Mr. Baxter established beyond question. This is evidently the question referred to by the court as unnecessary to decide (162 U. S., at p. 194):

> Some observations made by the Commission in its report on the nature of the circumstances and conditions which *would justify* a greater charge for the shorter distance, gave occasion for an interesting discussion by the respective counsel. But it is not necessary for us, in the present case, to express any opinion on a subject so full of difficulty.

In other words, no application having been made to the Commission under its dispensing power, it was not necessary to consider a question which could come up only after a ruling upon such application, assuming such ruling to be reviewable.

Whether such a refusal would be reviewable is a question thus left open. It seems, however, easy of solution; nor is it properly raised in the present case, since no application has been made by the appellee under the proviso to § 4; and this court certainly can not waive the absence of an application, whether or not the Commission could have waived it. Hence under § 4 as well as under § 6 the decree of the circuit court of appeals in the present case should be reversed and that of the circuit court affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

167-683

FEB 19 1897

The Supreme Court of the United States

OCTOBER TERM, 1896.

No. 539.

THE INTERSTATE COMMERCE COMMISSION,
Appellant,
vs.
THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of E. W. Meddaugh for Appellee.

(REVISED.)

DETROIT:
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The Supreme Court of the United States

THE INTERSTATE COMMERCE COMMISSION, Appellant, vs. THE DETROIT, GRAND HAVEN & MILWAUKEE RAILWAY COMPANY, Appellee.	Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief of E. W. Meddaugh for Appellee.

This is the case of a bill filed in the Circuit Court of the United States for the Western District of Michigan, by the appellant under section 16 of the interstate commerce act, to enforce obedience to an order of the Commission requiring appellee to discontinue the cartage of freight between its station and shippers, at the City of Grand Rapids, in the State of Michigan.

September 24, 1888, Stone & Carten filed their petition with the Interstate Commerce Commission, complaining of alleged discrimination by the appellee in delivering goods which came over its road, via Detroit, from Philadelphia and other eastern points, by means of drays at

the doors of the consignees at the City of Grand Rapids, while it only delivered such goods for petitioners, at Ionia, at its warehouse, Ionia being some 32 miles nearer Detroit than Grand Rapids is, and the charges of appellee for its service in transporting goods to each place being the same.

October 8, 1888, appellee's answer to the petition was filed.

April 26, 1890, the report and opinion of the Commission was filed.

The facts found by the Commission were as follows:

"1. The complainants are co-partners doing business under the firm name of Stone & Carten, and are engaged in the sale, at retail, of goods, wares and merchandise in the City of Ionia, County of Ionia and State of Michigan, purchasing said goods, wares and merchandise at Philadelphia, Pa., New York, N. Y., Boston, Mass., and points east of Detroit, Mich.

"2. That the respondent railway company is a corporation existing under and pursuant to the laws of the State of Michigan, and is a common carrier of passengers and property for hire between the City of Detroit and the City of Grand Haven, both of said places, and its entire line of railroad, being in the State of Michigan; but it does not own and control a line of steamboats plying across Lake Michigan between Grand Haven and Milwaukee, Wisconsin, but there is a line of steamboats engaged in the transportation of persons and property across Lake Michigan, between Grand Haven and Milwaukee, from which the respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road destined to Milwauke; that all of said boats are under the control and direction of an independent corporation organized under the laws of the State of Michigan, by the name of the Grand Haven & Milwaukee Transportation

Company; that the management of the business of the last named company is under the management and control of the same officers as those which manage and control the road and business of the respondent.

"3. The respondent, for its services as a common carrier, for continuous shipment under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights which makes on all freights from Philadelphia, New York and Boston and all other points east of Detroit consigned over the respondent's road, the same rates and charges for the complainants which are made and charged for the same class of freights to the merchants doing business at the City of Grand Rapids.

"4. The shipments of freight from Philadelphia, New York, Boston and points east of Detroit, which are delivered to respondent's road at said City of Detroit and transported by it over its line of railway, pass through the City of Ionia before reaching the City of Grand Rapids; that it is a shorter distance from Detroit to Ionia than from Detroit to Grand Rapids, and over the same line, in the same direction, the shorter being included in the longer distance.

"5. That the respondent provides at its own expense drays, carts and trucks at the City of Grand Rapids for the service of transporting merchandise and freight generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston and points east of Detroit, between its station at Grand Rapids and the places of business of merchants, traders and other patrons of its road at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders and patrons of its

road at the City of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; that its station at the said City of Grand Rapids is within the corporate limits thereof, and is, on an average, one and a quarter miles from the business section of said city, where the traffic of the places tributary to respondent's road originates and terminates, while respondent's station for receiving and discharging freight and property at the City of Ionia is not to exceed an eighth of a mile from the business center of said city; that at the City of Grand Rapids there are two other railroads, the Michigan Central Railroad and the Grand Rapids, Lansing & Detroit Railroad, both of which are immediately and directly in competition with respondent's road for the business of Grand Rapids; that the stations of both of said roads for receiving and discharging freight and property at Grand Rapids are near the business center of said city, requiring only short haul to and from their stations, on an average about one-quarter of a mile; that respondent did the carting of freight to and from its station at Grand Rapids, substantially in the same manner as at present, long prior to the time when either said Michigan Central or Grand Rapids, Lansing & Detroit Railroads were constructed to that place.

"6. That the actual cost of carting or draying freight from respondent's warehouse in the said City of Ionia to the several places in said City of Ionia, to and from which traffic has to be hauled, is two cents per hundred weight; that the cost of carting or draying freight transported over respondent's line to and from the places of business of the merchants, traders and other patrons of its road at Grand Rapids is two cents per hundredweight.

"7. That there is but slight competition encountered by the complainants and other persons, firms and corpora-

tions engaged in business at the City of Ionia, interested in shipping over respondent's road, with similar business at the City of Grand Rapids.

"9. That complainants have not brought any suit for the recovery of money or damages for which the respondent is alleged to be liable under the provisions of the act to regulate commerce, but have elected to adopt this procedure as the sole means of obtaining relief.

"10. The City of Grand Rapids has a population of about 70,000. The City of Ionia has a population of about 6,000. The freight traffic to and from Grand Rapids, by all roads, in 1887, amounted to 985,685 tons. The freight traffic to and from Ionia, by all roads, for the same time, amounted to about 55,000 tons.

"11. Cartage by railway companies, in a similar manner to that at Grand Rapids, is conducted by other railway companies at exceptional stations in the State of Michigan, and more or less extensively practiced by companies in other States, at exceptional stations."

Record, pp. 11-12.

On this state of facts the Commission, after reciting some of the facts and certain legal conclusions, made the following order:

"It is ordered and adjudged that the defendant, the Detroit, Grand Haven & Milwaukee Railway Company, be and it is hereby required, within thirty days from and after the service of a copy of the report and opinion in this proceeding, and of this order, to wholly cease and desist from furnishing free cartage of freights at Grand Rapids, in the State of Michigan, whereby rebates from its lawfully published schedule of rates, fares and charges at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from eastern points to Grand

Rapids aforesaid are made less than charges for the transportation over its line of like kinds of property shipped from the same eastern points to Ionia, in the State of Michigan.

"And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the commission herein, in conformity with the provisions of the fifteenth section of the act to regulate commerce."

Record, p. 16.

A copy of this order was duly served on appellee.

June 9, 1890, the Commission was informed that the appellee would not comply with the order until the judgment of the Commission should be judicially confirmed.

Record, p. 17.

November 2, 1891, appellant filed the petition in this case in the Circuit Court of the United States for the Western District of Michigan for enforcement of the order.

Record, p. 18.

December 6, 1891, appellee filed its answer thereto.

Record, pp. 18-20.

The answer admitted the facts to be as found by the Commission, and set up certain additional facts which were afterwards supported by testimony and are not controverted. These additional facts are stated in the opinion of the learned Circuit Judge (Record, pp. 78-79) as follows:

"The answer of the defendant to the bill * * * * * * * * * * averred that it had been the practice of railway companies engaged in interstate commerce to

do free cartage as a means of obtaining traffic at exceptional stations on the lines of the railroads, where the business was of sufficient magnitude to warrant the carrier in incurring the expense, and that such expense was deemed to be legitimate as a means of securing traffic for the railroad, and of affording increased facilities and dispatch for doing its business; that on every railroad in Michigan and in the United States there were tracks constructed by the railway company, at its own expense, at exceptional stations on the line of road, leading from the main track of the road to private business establishments, which were used solely for delivering and receiving freight in the business between such private business establishments and the railway, and without any charge being made by the railway company therefor; though there were private business establishments at the same station of the railroad not furnished with these advantages in connection with such traffic; that such practice did not infringe any provision of the interstate commerce law, and yet it involved quite as clear an element of discrimination as the cartage system at Grand Rapids; that the practice of free cartage was originally adopted because it was less expensive than would be a change of its line so as to bring it into nearer proximity to the business center of the city or the construction and operation of spur tracks from the main line of road into the business center where the main line tracks of its competitors, the Michigan Central and the Detroit, Lansing & Northern Railroad Companies, were laid in said city; that the free cartage had the additional advantage of enabling the carrier to promptly clear the freight buildings of traffic and prevent its burdensome and expensive accumulation, and that it secured a method and order in the delivery of its traffic from its buildings; and that it also saved the expense of sending notice to the consignees of the arrival of freight; that the free cartage at Grand Rapids was an absolute condition

of the respondent's procuring for its road any considerable part of the freight traffic of the city; that the two cents a hundred pounds paid for cartage at the City of Grand Rapids by respondent was not paid alone for its cartage, but included the services of the cartage agents acting in behalf of respondent in soliciting freight traffic for its road and collecting bills for freight charges; that the value of these services, aside from the mere matter of carting the freight, was not less than one-third the sum which respondent paid."

August 7, 1894, the decree of the Circuit Court was entered, which, after reciting the facts found, and conclusions of law, ordered as follows:

" * * * that the mandatory writ of injunction of this Court do issue to said respondent, the Detroit, Grand Haven & Milwaukee Railway Company, commanding it and its officers and agents to forthwith desist and refrain from affording said free cartage at said City of Grand Rapids, unless a like service or its equivalent in value by reduced rates be at the same time afforded at said City of Ionia, and unless the fact that such free cartage or such equivalent reduced rate is afforded at both points shall be noted on the established tariffs of freights and charges published as required by law."

Record, pp. 92-93.

September 6, 1894, an appeal from said decree to the United States Circuit Court of Appeals for the Sixth Circuit was perfected by the appellee.

Record, p. 96.

April 14, 1896, the decree of the Circuit Court of the United States for the Western District of Michigan was reversed, and the cause remanded to the Circuit Court, with directions to dismiss appellant's petition.

Record, pp. 99-134.

The case comes here by appeal from the judgment and order of the Court of Appeals.

The errors assigned are as follows:

1. That said Circuit Court of Appeals erred in reversing the decree of the Circuit Court in said cause.

2. That said Circuit Court of Appeals erred in remanding said cause to the Circuit Court, with directions to dismiss the petitions of the Interstate Commerce Commission.

3. That said Circuit Court of Appeals erred in not decreeing the enforcement of the order of the Interstate Commerce Commission.

4. That said Court erred in finding that the cartage service rendered by the Detroit, Grand Haven & Milwaukee Railway Company to its customers at Grand Rapids was not a part of the transportation service itself, and that the carriage by rail and the cartage were not a continuous carriage within the meaning of the act to regulate commerce.

5. That said Court erred in finding that the circumstances and conditions existing at Grand Rapids were so dissimilar from those at Ionia as to justify said railroad company in charging as high a rate for the service of transportation to its station at Ionia, the shorter distance point, as it charged in the aggregate, both for such service to its station at Grand Rapids, the longer distance point, and for the additional service of cartage from its station and delivery to its customers at Grand Rapids.

6. That said Court erred in finding that, if a case of undue preference under the act to regulate commerce is established, the Interstate Commerce Commission can make no order "as to how the inequality should be re-

duced, and the choice between the different ways must always be left to" the carrier.

7. That said Court erred in finding that there was no "power in the Circuit Court to modify or change the order of the Commission."

Record, pp. 135-6.

While not dealing with these alleged errors specifically, the ensuing argument will embrace them all.

Before discussing the law of the case, it is important that we determine at the outset, definitely, what specific thing of fact appellee is charged with—whether the payment of rebates, or the receiving more or less from one person than from another for a like and contemporaneous service; or with charging more for transportation a short distance than it charged for transporting similar property a longer distance in the same direction, etc.; or, finally, with having given "an undue or unreasonable preference or advantage" in the service rendered to the shippers of Grand Rapids.

What the grievance was at the inception of this protracted controversy is very clear. In the petition of Stone & Carten, filed with the Interstate Commerce Commission, it was stated that the appellee had "established and published a tariff of freights and charges which makes, on all freights from Philadelphia, etc., the same rates for your petitioners at Ionia that are charged for the same class of freights to the merchants of Grand Rapids," and the charge was that appellee discriminated against the petitioners, and in favor of the merchants at Grand Rapids, "by delivering all such freights at the warehouse in Ionia and at the doors of the consignees at Grand Rapids." The petition further stated that this delivery at Grand

Rapids from the warehouse was by drays, without charge therefor.

Here, in this initial complaint on which all subsequent proceedings rest, the act with which appellee was clearly and distinctly charged was that of rendering more service to the shippers at Grand Rapids than it rendered to petitioners at Ionia, while imposing the same freight rate on the shippers of both places.

It is immaterial that the pleader thought this amounted in legal effect to a violation of sections 2, 3 and 4 of the interstate commerce act, and so averred. A majority of the Interstate Commerce Commission afterwards—and later, in this case, the learned Circuit Judge—agreed with him. The question is one of law, and I shall consider it further on. It is necessary to first settle the facts.

Next, in the finding of fact by the Commission, it is said:

"3. The respondent, for its services as a common carrier for continuous shipment under a common arrangement, of property from Detroit to its stations on its line of transportation, established and published a schedule of rates and charges, a tariff of freights, which makes on all freights from Philadelphia, New York, and Boston, and all other points east of Detroit, consigned over the respondent's road, the same rates and charges for the complainants which are made and charged for the same class of freights to the merchants doing business at the City of Grand Rapids. * * *

"5. That the respondent provides, at its own expense, drays, carts and trucks at the City of Grand Rapids for the service of transporting merchandise and freight generally, as well as merchandise and freight consigned from Philadelphia, New York, Boston and points east of Detroit, between its station at Grand Rapids and the places of business of merchants, traders and other patrons of its road

at that place, which service it performs without additional charge to the owner or shipper of property on account thereof; that this service is not furnished to complainants or other merchants, traders and patrons of its road at the City of Ionia; that this service at Grand Rapids has been openly and notoriously rendered for a long period of time, to wit, for twenty-five years and upwards; * * * *"

This finding by the Commission is explicit, that more service was rendered by the railway company to the shippers at Grand Rapids than was rendered to those at Ionia, for the same freight rate charged and received. Simply that, and nothing more.

This state of facts set forth, as we have seen, in the original complaint filed with the Commission, and afterwards so distinctly embodied by the Commission in its report, which constituted the sole basis of the order to enforce which the suit in the Circuit Court was instituted, is the same state of facts on which the judgment and order here in review rests.

It would therefore seem to be conclusively established that the act for which this appellee has been under complaint from the beginning, is that simply of giving more service in the transportation of property consigned to Grand Rapids than it gave to that for Ionia, while maintaining the same freight rates for both places.

The broad general question, then, is whether this rendition of more service at Grand Rapids than at Ionia, in the transportation of traffic to and from these places, constitutes a violation of the interstate commerce law, under the facts and circumstances of this case.

I.

My first proposition is that the additional service rendered by the appellee at Grand Rapids beyond that rendered at Ionia, did not involve a violation of either section 2 or section 4 of the statute.

The interstate commerce act had its origin in two definite and fundamental purposes. The first was to apply to interstate traffic the common law rule that the rate of charges of the common carrier shall be reasonable; and the second was to prevent unjust discrimination between persons and places, either in rates, facilities or accommodations by the carrier of this traffic.

The first of these purposes was accomplished by the simple provision of section 1, "that all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be reasonable and just."

The other purpose was sought to be effected by the provisions of sections 2, 3 and 4.

There are only two ways in which the common carrier can discriminate between persons or between places, namely, (1st) in the rate charged, and (2nd) in the service rendered, including facilities and accommodations furnished. This congress recognized in the enactment of these three sections of the law, and each section has a definite intent of its own. Section 2 forbids the carrier from exacting a greater or less compensation from one person than it receives from another for a like and contemporaneous service, etc. The meaning of this seems to be very plain. Congress evidently had in view the

securing to shippers of even rates for the same service, and it had nothing else in view in the provisions of this section. The specific abuse of differing rates of charge for the same service concurrently rendered was here aimed at. Discrimination in other ways, as by rendering more service for one person than for another for the same rate charged, was not sought to be reached by this provision. To bring any case within the terms of section 2, the contrasted service must be "like and contemporaneous." This likeness in the service, in degree or extent of it as well as in kind, is the essential condition of the offense.

Nothing could be clearer, I submit, than that we have in this section the simple and literal inhibition against charging, collecting or receiving from one person more than from another for the same service, either directly or by means of any device; and that the idea of unjust discrimination by means of greater service in the transportation of property and persons is not included in it.

It is undoubtedly true, as the circuit judge states, that the carrier might render a service for a favored shipper or class of shippers which would be equivalent to a rebate payment or receiving from them a less rate than was being charged other shippers not so favored, and thus violate section 2 of the law. But this could not be in the legitimate transportation of the property; it would have to be in some service outside of the recognized limit of the carrier's sphere of operation, and it would then be a rebate by device.

In the case of the Interstate Commerce Commission vs. Baltimore & Ohio R. Co. (145 U. S., 281), which involved the right of a carrier to make a rate covering the transportation of ten or more persons lower than the rate given to a single passenger for like transportation, Justice Brown used the following language: "In order to consti-

tute an unjust discrimination under section 2, the carrier must charge or receive *directly* from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but in either case it must be for a 'like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions.'"

Delivery to the carrier by drays is a common and extensively practiced part of the carrier's business, as the testimony in this case and the finding of the Interstate Commerce Commission concede. It is immaterial to the point that such delivery is not the rule; it is sufficient that it prevails, and always has prevailed, since railroads have existed, to such an extent in circumstances like those at this Grand Rapids station as to become recognized as a legitimate part of the service for which the schedule rate of the carrier pays. Appellee has been doing it at this station for twenty-five years, not only without question from any quarter, but under the authority of a specific act of the Michigan Legislature. This act provides as follows:

"Sec. 3. Every railway company in this State is authorized to make personal delivery of every parcel, package, or quantity of goods or property, if the consignee of such property shall reside within two miles of the terminus, or railway station, or other terminus of the carriage of such property by the main line of such carrier, and they are hereby authorized to employ or own all the means necessary to perform such duty, and to place the men and vehicles therefor under the government and sole regulation of the superintendent or other proper officer of such companies. Such delivery shall be at the house, shop, office, or other place of business of the consignee, accord-

ing to the nature of such property, and where the owner or consignee desires to have the same."

Compiled Laws of 1871, Section 2375.

It is equally clear that section 4, or the long and short haul provision, was intended to provide by a rigid rule against one well-known form of discrimination which the act conclusively presumes to be always unjust, namely, that of charging more for a short haul than for a longer haul in the same direction, when the shorter is within the longer distance, and the circumstances and conditions of the service are substantially similar. Discrimination by additional service in transportation of the property is no more the thought of this section than it is of section 2, nor, I respectfully submit, can it be construed into embracing such discrimination, without doing violence to the language used.

Judge Wallace, in re Morris vs. D., L. & W. Ry. Co., 2 I. C. Repts., 617-622, says:

"Unjust discrimination is prohibited by sections 2 and 3 of the interstate commerce act. What constitutes unjust discrimination may be ascertained from the language of these sections as well as of the section which authorizes the Circuit Court to redress it by mandamus. By section 2 it consists in *charging one person a different compensation than is charged another for doing* 'the like and contemporaneous service, in the transportation of a like kind of traffic under substantially similar circumstances and conditions.' By section 3 it consists in giving *'any undue or unreasonable preference or advantage'* to any particular shipper or subjecting him to any undue or unreasonable prejudice or disadvantage 'in any respect whatever.' The

former relates to *unjust discrimination in rates.* The latter is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service."

In the case of Trammell vs. Clyde Steamship Co. et al., 4 I. C. Repts., p. 140, Commissioner Veazey very clearly stated the distinctive purpose and scope of these three sections of the act. Having pointed out that under the English Railway and Canal Traffic act a greater charge for the shorter haul was triable under the provision which corresponds to section 3 of our act, while proceedings for the offense under the latter act must be taken under section 4, he says:

"In either country a complaint of undue preference or prejudice must (prior to the English statute of 1888, which shifted the burden to the carrier) be supported by proof of damage which makes the preference or prejudice unreasonable or undue, but in cases brought under our fourth section, or long and short haul clause, which particularly describes the act it declares to be unlawful, such proof is not required.

"A case of undue or unreasonable preference or advantage or prejudice or disadvantage includes, as the terms themselves imply, consideration of all those circumstances and conditions which bear, not only upon the transportation by the carrier, but also often relate to the value and volume of the traffic, the favorable or unfavorable location of the places involved in the controversy, character of grades on different divisions, lateral lines, and other essential elements which enter more particularly into matters of relative services and relative rates.

"This undue preference clause may be justly termed an omnibus provision, enacted first by Parliament and then by Congress, to prohibit carriers from doing any act which

unduly or unreasonably puts one shipper or description of traffic up in the scale of favor or puts another shipper or description of traffic down to his or its disadvantage or wrong. But when the Act to Regulate Commerce was passed, Congress not only adopted that clause, but saw fit to go *further and specify that certain charges by the carrier would in themselves constitute wrong. The second and fourth sections of the act—that is, the unjust discrimination and long and short haul clauses—are provisions of this character.* Under these sections the carrier must not charge more for like service nor more for less service rendered in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

In other words, for the carrier to charge one person a higher rate than another for substantially the same service rendered at the same time, or to charge more for transporting property or persons a short distance than it charges for a contemporaneous transportation a long distance in the same direction—the shorter being included within the longer—is by these provisions of the act presumed to result in unjust discrimination. But this presumption may be rebutted.

II

But if the alleged offense were within the provisions of either section 2 or section 4, the dissimilar circumstances and conditions at Grand Rapids to those at Ionia justify appellee's practice of carting at the former place.

The Commission has uniformly held, as in this case, that the only circumstances and conditions open to consideration on a question of alleged discrimination under section 2 or section 4, are such as affect the cost of the carrier's service.

Since the hearing of this case in the Court of Appeals, has occurred the judgment of this court in the case of Texas & P. Ry. Co. vs. Interstate Commerce Commission (162 U. S., 197). The principle there announced for interpreting and administering the interstate commerce act is so fully in harmony with our contention here, waiving the distinction I have made between the different sections of the act, that I desire to quote a part of the opinion. Justice Shiras says (p. 217):

"The commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions,' as they are directed in the act to consider. The commission thought that it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act, we think the commission erred.

"As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act, to justify such a supposition.

"So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that in considering questions of this sort the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that

they seek, by the charges they make, to secure it, operates in the interests of the public. * * *

(P. 219) "The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable. When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the act, to enter into the question. * * * (P. 233) The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce, by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that in the exercise of its jurisdiction, the tribunal may and

should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadvantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act requires that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country."

In Interstate Commerce Commission vs. Cincinnati, etc., Ry. Co., 4 I. C. Repts., 332, which was the case of a petition for enforcement of an order of the Commission, Judge Newman, at page 343, after referring to the ruling of the Commission to the effect that competition by water and by another railroad not subject to the law, existing

at the remoter station, but not at the intermediate station, would constitute such dissimilar circumstances and conditions as would justify a lower rate for the former station, says:

"If the general conclusion is correct, that competition will constitute dissimilar circumstances and conditions, in the sense in which that term is used in the act, there seems to be no good reason for drawing the line where it has been drawn by the Commission; but, on the contrary, it does seem that competition of carrier with carrier, both subject to the act, is as much within the terms of section 4 as competition with a carrier not subject to the act."

In the case of ex parte Koehler 1 I. C. Repts., 317; 31 Federal Reporter, 315, Judge Deady said:

"In my judgment, Congress, in limiting the prohibition contained in section 4 of the act against discriminating charges between long and short hauls to cases where such hauls are made 'under substantially similar circumstances and conditions,' has recognized the rule laid down in ex parte Koehler, 23 Federal Rep., 533, as a proper one. Freight carried to or from a competitive point is always carried under 'substantially dissimilar circumstances and conditions' from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from or to a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. * * * * In the former case, the circumstances are altogether different. The power of a corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or, as was said in ex parte Koehler, 'abandon the field and let its road go to rust.' Competition may not be the only circumstance

that makes the condition under which a long and a short haul are performed substantially dissimilar. But certainly it is the most obvious and effective one, and must have been in the contemplation of Congress in the passage of the act."

In the case of the Interstate Commerce Commission vs. A., T. & S. F. Ry. Co., 50 Federal Rep., 306, Judge Ross said: "The common carrier cannot be required to ignore or overcome existing differences in the transportation facilities of different localities created not by its own arbitrary action, but by nature or by enterprise beyond its control." And, again, he says: "Wherever and whenever actual competition exists, the question the carrier has to deal with is not so much what is a fair rate for the service, or what the traffic will bear, but what rate can be got for the service as against the rate offered by the competitor."

What appellee's situation is at Grand Rapids, as compared with Ionia, requires no comment. The remoteness of its railroad station at the former place from the business center, the more favorable situation there of its competitors for traffic, while at Ionia its railroad and station are in the business center of the place, all sufficiently appear and are undisputed. These dissimilar circumstances and conditions should justify a literally lower rate at Grand Rapids than at Ionia, this being the only condition on which it can secure any considerable traffic there.

To this the Interstate Commerce Commission simply said, No. It did not find or hold that the cartage was an *excessive* rebate, but that it was *per se* unlawful.

The late Justice Jackson, in Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co. (43 Fed. Rep., 37),

took the correct view, I submit, of the purpose and scope of this act of Congress, in the following language:

(P. 44) "The act to regulate commerce does not undertake to deal with the subject of rates for transportation services, or with the business considerations which may influence common carriers in so adjusting them as fairly to increase their revenue, while paying due regard to the convenience of the public, any further than to declare the general principle that such rates shall be reasonable and just, shall be free from unjust discrimination, and shall confer no undue or unreasonable preference or advantage, nor impose any undue or unreasonable prejudice or disadvantage. Subject to these conditions and limitations, the act does not, and was not intended to, restrict the common law right and power of common carriers to make special contracts, or adjust their rates with reference to existing wants and circumstances, so as to promote their own interests, while affording all proper and reasonable facilities and conveniences to the public. Subject to the above conditions, the act intended to leave the adjustment of rates as absolutely and completely in the discretion of the carrier as it existed at common law, which never questioned or denied to common carriers the right to give or make lower rates, based on increased quantity or amount of service."

(P. 48) "When this Court is called upon, either by the Commission or others, to enforce the provisions of the act to regulate commerce, it is indispensably necessary to show either a case of individual grievance or of public inconvenience resulting or arising from acts of the carrier done in violation of the statute."

(P. 49) "Under the flexible and elastic rule prescribed by said sections, construed in the light of section 1, a difference in charges, while an element in the proper definition of unjust discrimination or undue preference,

is by no means the sole or controlling factor. To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. In respect to passenger traffic, the position of the respective persons or classes between whom differences in charges are made must be compared with each other, and there must be found to exist substantial identity of situation and of service, accompanied by irregularity and partiality, resulting in undue advantage to one or undue disadvantage to the other, in order to constitute unjust discrimination."

(P. 50) "Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue preference or disadvantage, persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

This Court subsequently affirmed the judgment of the Circuit Court, in that case.

145 U. S., 263.

III.

If I am correct in my contention that appellee's practice of carting traffic at Grand Rapids while not doing so at Ionia, was not an offense under either section 2 or section 4 of the act of Congress, it remains to inquire whether or not the practice involved a violation of section 3.

The entire provision of this section reads as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable preference or disadvantage in any respect whatsoever."

This section, unlike sections 2 and 4, is not limited to the prohibition of well known methods of discrimination, which are named, but is general in its phraseology, including any and all means of discrimination which result in "undue or unreasonable preference or advantage" of one person, shipper or locality over another.

Again, the particular things specified in sections 2 and 4, namely, the charging of one more than another for the same service, whether by payment of rebates or by any other "device;" or the charging more for a short than for a longer haul, etc., are prohibited, it may be held, without reference to the extent or degree of discrimination involved. But the thing complained of under this section, to constitute an offense must result in an "undue or unjust preference or advantage." In other words,

if it be held that the methods of discrimination specified in sections 2 and 4 are absolutely prohibited (subject to the saving power of the Commission as to section 4), it is clear that other methods which are alone covered by the general language of section 3, are only prohibited when some interest is *unduly or unreasonably prejudiced.*

It might, for the purpose of this case, be conceded that the practice complained of would amount to a discrimination against Ionia if there existed any competition in trade between the two places, but the finding of the Commission is, in effect, that there is no competition. "But slight competition" is the language of the finding, and this should be equivalent, in the eye of the law, to none at all. I shall speak of this feature of the case later.

If this competition were considerable, it still would not follow that the law had been violated.

There being no dispute of fact here, the question of preference or advantage is one of law, and it is therefore for this court to determine whether carting at Grand Rapids, while not doing it at Ionia, is or is not an undue preference of the former as against the latter.

The answer depends on a variety of considerations.

In this connection the additional facts set up in the answer of appellee, and fully sustained by the evidence, become material.

As was said by the Supreme Court of Florida, in the case of the Pensacola & Atlantic Ry. Co. (2 I. C. Repts., 528): "To earn money is a purpose and legitimate object of a railroad company." This is, in fact, its primary object, and the law, while recognizing the right of the carrier to do this, interferes with the business only to the extent necessary to prevent injustice being done. Neither the common law nor the act of Congress ignores this object of the common carrier's existence, or seeks to unreasonably obstruct its realization.

Now, it appears that it has long been the practice of the railway companies in this country—and there is no doubt the same state of things exists with railway companies in England—to render more service, afford better facilities, to the shipper at one station than at another, and even to some shippers than to others at the same station, where the rate of transportation is the same to all. The construction and operation of belt railways at exceptional stations, and the extension of spur tracks to the places of business of some shippers, while not doing it for other shippers at the same station, afford illustrations of this.

The attempt in the evidence to make it appear that the spur tracks, and the reception and delivery of freight upon them, involve an expense to the shipper and consignee equivalent to that which shippers and consignees who are not so favored have to incur in carting to and from the carrier's station, totally fails. The only contribution these spur-track shippers make in any case is the use of the land for the tracks in some instances. It does not appear that even this is universal. No evidence can be necessary to enable the court to appreciate how insignificant in value such a contribution necessarily is in most cases. It rarely amounts to more than would a wagon roadway over the same route or some other, which would be necessary if the spur track did not exist, to enable the shipper to deliver and receive his freight by cart or wagon.

Where spur tracks alongside of a shipper's warehouse or place of business do not exist, the freight is received and delivered at stations on what are known as team tracks. The freight does not go into the carrier's freight shed or station. In both cases—that of the spur track and the team track—it appears that the shipper loads the freight into the car and the consignee takes it from the car, the carrier furnishing no service in this behalf in either case.

In the case of the spur track the freight is transferred directly to and from the shipper's warehouse without hauling. In the case of the team track, the freight, if for shipment, is handled by the shipper from his warehouse to a cart or dray, hauled thence to the car, and there again handled from the cart or dray into the car; or, if for delivery to the consignee, the freight is handled by him from the car to a cart or dray, hauled thence to the warehouse, and there again handled from the cart or dray into the warehouse. The team track delivery thus involves a double handling of all freight so received or delivered, as against a single handling by the shipper or consignee on a spur track. In addition to this disadvantage of the former, is the expense he has to incur in carting all his freight between the car and his place of business.

The New York Central Railroad Company has its freight station in the City of New York on the line of its road. This station is a considerable distance from the business center of the city. In order to accommodate the traffic and secure an equality of position with its rivals on the west side of the river (who maintain a ferry system running directly to the center of the business section of the city by which they receive and deliver freight there) the New York Central Company carries traffic by lighters between its station and certain places within the city much nearer the shipping and trading center than its freight station. No extra charge is made for this extra service. But, more than this, it appears that the New York Central Company only makes this lighterage haul of traffic within a specified and limited district of the city. All shippers outside of the limited district are required to pay extra for the service. The lighterage service is justifiable on the same grounds—and on no other—that I have urged in support of appellee's cartage service at Grand Rapids.

A similar state of things is shown to exist at Philadelphia, where traffic is extensively delivered and received on private sidings without extra charge and for the accommodation of certain shippers of the place.

The justification for this measure of discrimination, which prevails on all railroads to a greater or less extent, is to be found partly in considerations respecting the carrier's interest, and partly in considerations affecting the interests of the public. To secure an increase of traffic or add to the facility of handling existing traffic will often justify the carrier in incurring the expense of constructing a belt railway or spur track by which freight may be received and delivered at the door of a shipper's store or warehouse, or will equally justify a delivery to shippers within a limited district by boats, as is the practice in New York, while other shippers dealing with the carrier at the same station are left to deliver and receive their freight at the station and incur the expense of carting between it and their places of business. As a rule, these belt railways and spur tracks reach the large shippers, and the business thus accommodated and secured is of sufficient value to the carrier to justify the required capital expenditure for the increased facilities, while it could not afford to do the same thing for all small shippers scattered over a large territory of the place, or for a few small shippers at some other place on its line.

Is this an "unreasonable preference?" I submit it is not. Neither the shippers of the same place, nor those of any other place, have the right to require the carrier to sacrifice its pecuniary interest to the extent that would be involved in the discontinuance of this practice. Such a requirement would itself be unreasonable. Perfect equality in this, as in most other things, is impossible. The act of Congress has wisely recognized this in the language used in prescribing the duty of these carriers re-

specting discrimination, by the qualifying words "undue or unreasonable."

And yet any judgment of this Court which sustains the decree of the Circuit Court must condemn this universal practice of the railway companies of the country. There is no essential or distinguishable difference between this practice, which prevails on all railroads, and the thing complained of at Grand Rapids. In both, the carrier simply renders more service to the shippers at one place than at another for the same consideration of transportation rate paid. And the effect of this, in both cases equally, is to give a pecuniary advantage in the one case to the shippers of one place over those of another, and in the other case, to one or more shippers over others at the same place. The merchant or manufacturer at any station who gets his material delivered by the carrier at his warehouse, while another merchant or manufacturer at another station on the same road, or at the same station (which is often the case), is compelled to pay cartage between the station and his warehouse, the transportation rate being the same for both, has a pecuniary advantage over the latter.

The methods of railway companies in respect of this matter of belt railways, spur tracks, etc., which are familiar knowledge to all observing people, must be presumed to have been known by the members of Congress who are responsible for this interstate commerce act. Is it for one moment to be presumed that Congress intended by this act to revolutionize the business? If so, the task is too great for the machinery provided. Not one commission should have been created with its seat at Washington, but as many as there are States of the Union. Either this, or the purpose of the act in this regard, should have been so explicit in its provisions as to have left no possibility of its being honestly questioned. This well-known practice should have been in terms prohibited by the act,

and would have been, I submit, had Congress intended to prohibit its continuance.

Is this Court prepared to say that the appellee, with its relatively insignificant business, must desist from cartage delivery at Grand Rapids, to its very great pecuniary detriment, in face of the fact that the same practice, both in legal and business effect, prevails on a large scale, openly, on all the great railway lines of the United States, and without complaint from any quarter?

The learned Circuit Judge concurs in the conclusion of the majority opinion of the Commission, that the cartage service at Grand Rapids is equivalent to the payment of a rebate. As I have before said, what appellee is doing there is to render more service for the transportation rate charged than it renders at Ionia for a like rate charged at the latter place, and it does this at an increased expense to itself. This is not only done by every railroad carrier in the United States, and always has been done in the methods I have indicated, but it is also done in every instance of grouping stations for rates. And this grouping of stations the Commission has expressly sustained in a number of cases.

Howell vs. N. Y., L. E. & W. R. Co., 2 I. C. Repts., 162.

Imperial Coal Co. vs. P. & L. E. R. Co., 2 I. C. Repts., 436.

Coxe vs. L. V. R. Co., 3 I. C. Repts., 460.

There is only this difference between the rate grouping practice and that of delivery at the door of the consignee —that in the former case the nearer shipper is simply deprived of the natural advantages of his location, while in the latter the shipper who is denied such delivery is compelled to incur the expense of carting his freight. But the fact remains that in the grouping practice an "advantage" is given to the shipper on the line most remote in the group. And yet the Commission holds that

this is not necessarily an infringement of the act. Whether it is so or not depends on whether the grouping is reasonable or not, and whether it is reasonable or not depends on considerations affecting the business of the carrier, as well as that of the public. To render it unreasonable in any case, one thing is absolutely necessary to appear, namely, that some interest is unduly prejudiced by it. There is no such showing here.

And the Commission has also held that competition of a water route or of another railroad which is not subject to the interstate commerce act, will justify a higher rate for the shorter haul in the same direction, etc., on the ground that such competition constitutes dissimilar circumstances and conditions of the service rendered.

In re Southern Ry., etc., Co., 1 I. C. Repts., 278.

King vs. N. Y., N. H., etc., R. Co., 3 I. C. Repts., 272.

New Orleans Cotton Exchange vs. Ills. Central R. R. Co., 2 I. C. Repts., 777.

Lehmann vs. Southern Pacific R. Co., 3 I. C. Repts., 80.

Business Men's Assn. vs. Chicago, etc., R. Co., 2 I. C. Repts., 43.

The Commission is clearly right in these rulings. The opposite view of the law's requirements would have the effect to cripple railway companies in their business, without accomplishing any compensatory benefit to the shipping public.

So I insist, in respect of the question here involved, that to deprive the appellee of the privilege of receiving and making delivery by carts or other vehicles at the place of business of the shipper at Grand Rapids, harms no one and is an actual benefit to the shippers of that place and to the appellee, and is, therefore, permissible. There is no public interest shown in this case in deference to which the appellee can justly be required to make so great a sacrifice as the order of the Commission demands. What

is there peculiar to the interest of the shipper of merchandise which renders it so sacred that the carrier must suffer unreasonably for its protection? There is a popular spirit which justifies any degree of injustice to railroads that brings or promises some immediate gain to the shipping interests. This spirit has already warped legislation and accomplished much mischief. Railway companies, I submit, have some rights that are entitled to respect and protection, and these fix the boundary of the shipper's right. Whenever he demands anything of these carriers, under the law, the granting of which imposes an unjust loss upon them, he should not have the aid of the courts unless the provisions of the law in his favor are clear and imperative. This is not the case here.

Every difference that exists between station accommodations and facilities on any railroad is not only liable to involve a pecuniary advantage to one station over another, but many of these differences we know do so. The location of a freight station much nearer the business center at one place than at another has this effect. For, if the shippers are left to receive and deliver their own freight at the station in both cases, the cost of cartage must generally vary with the distance. And even where the cost of cartage is the same, it is apparent that more trips can be made in a given period of time where the distance to the station is shortest, and it is to be presumed in this, as in all other business, that time is money. On this theory, Grand Rapids might have a good case against the appellee for locating and maintaining its station an eighth of a mile from the business center of Ionia, while its station at Grand Rapids is one and a quarter miles away.

The Commission has held, as I have already shown, that competition by water, or by another railroad not subject to the act at the remoter station, takes the case out of the

prohibiting clause. Yet the excuse of water competition or the competition of a railroad not under the law, does not diminish the injurious effect of the reduced rate upon the people of the nearer place. It is evident that the Commission, in its ruling respecting water competition, under the fourth section of the act, has taken the business view—which is the common sense view—of the situation, and considered that a reduction of the rate being the only condition on which the carrier could get the traffic, it should be permitted to make the reduction, even though the nearer station suffered somewhat. In other words, the interest of the carrier is given due weight. And yet we have in this what the Circuit Judge calls "the equivalent of a rebate," in the effect on the cost of the merchant's goods in his store.

The learned Circuit Judge in this case and the Commission unduly ignored the interest of the carrier. Both opinions proceed on the theory that, in determining whether a given advantage of one place over another on a line of railroad is "undue or unreasonable," or under dissimilar circumstances and conditions, the only elements to be considered are those affecting the shippers of the two places. This theory is no less erroneous in principle than it is in direct conflict with other judgments of the Commission in the cases I have referred to. The carrier's interests are involved, and must be duly regarded and weighed.

In Ransome vs. Eastern Counties Ry. Co. (1 R. & C. T. Cases, 63), the English Court said, with reference to this question of discrimination (page 70): "After a good deal of consideration, we think that the fair interests of the railway ought to be taken into account." One would think that it ought not to have required very much consideration to reach such a conclusion, where the statute

had not expressly negatived the right to weigh the railway interests involved.

Grand Rapids is a city of 70,000 people, and the railway traffic of the place for the year 1887—the year immediately prior to the making of this complaint—amounted to 985,685 tons. The population of Ionia is only 6,000, and its railway traffic for the same time was 55,000 tons. In addition to the necessity that appellee is under, by reason of the great distance of its station at Grand Rapids from the business center of the city and the better situation of its competitors there, to carry freight to and from the shippers either by carts or drays, or by incurring a very large capital expense in constructing additional railroad tracks, in order to secure traffic, the large volume of business of the place, and the revenue which the carrying of it brings to the company, justify appellee, from the standpoint of its own interest, in rendering this service there, while the business of Ionia will not. This is a pure business matter, and has to be dealt with by every railroad company in the land in one form or another, at different stations on its line of road, and often, as I have said, at the same station. And the railway companies cannot be interfered with in the prevailing method of their operation in this respect without working most serious loss, not only to the railway companies themselves, but to the shipping public—a loss, in the aggregate, that will enormously outweigh all possible gain that can result to any other interest. Only when the result is a manifest injustice to some important shipping interest should the law interfere.

The record shows that appellee's station is one mile and a quarter from the business center of Grand Rapids, while its competing carriers are in the heart of the city. It must equal this advantage of its competitors to the shippers of the place, as a condition of securing a share of the

business. Precisely the same alternative is upon it in respect of the matter of rates as where there is water competition. In the latter case, as has been shown, appellee might meet the rates at Grand Rapids without reducing at Ionia. Why, by parity of reasoning, is it not permissible to give the additional service at Grand Rapids for the same end?

The Commission has said: "He (the carrier) may be obliged to carry freight at a lower rate to some localities than to others, but this in itself does not constitute an injustice or injury to the shipper in a less favored locality, so long as the charges are reasonable in themselves, and alike to all in the same situation."

Judge Deady, in ex parte Koehler (23 Fed. Rep., 533; 1 I. C. R., 319), said: "It is not the fault or contrivance of the railway that compels this discrimination. It is the necessary result of circumstances altogether beyond its control. It is not done wantonly for the purpose of putting the one place up or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils."

This is equally true of the appellee's condition at Grand Rapids. Its station was located there when the city was a small village.

In Business Men's Association vs. Chicago, etc., Ry. Co., 2 I. C. Repts., 47, the Commission said: "But to determine the reasonableness and justness of a rate, all surrounding circumstances and conditions, and the factors which enter into the making of the rate, if there are any that are compulsory or imperious, must be considered, as well as the rights of the shipper."

This is, unquestionably, so far as it goes, a correct view of the law, but it is just what the Commission did not do in deciding this matter on the complaint of Stone & Car-

ten. The "compulsory and imperious" conditions which appellee's situation at Grand Rapids imposes upon it in respect of the freight traffic of that place were completely ignored in the majority decision. The rule of the greatest good to the greatest numbers applies here. It is the only practicable rule in this matter, modified by exceptional cases.

In the case of the Local Board, etc., vs. The Northeastern Ry. Co. (3 R. & C. T. Cases, 306), it was held by the English Commission that the railway company had not contravened section 2 of the English act in refusing to provide a passenger station at Newington for the reason that the traffic of the place was not sufficient to justify the company in incurring the expense.

Section 3 of our act is substantially a copy of section 2 of the English Railway and Canal Traffic Act. The case of Phipps vs. Railway Co., 2 Q. B. (1892), 229, was an application by a furnace owner at Duston to restrain the defendant from giving what was charged to be an undue preference to the owners of furnaces at Butlins and Islip in the transportation of coke, etc. The complainant had access only to defendant's railroad, while the furnaces at Butlins and Islip had not only defendant's road, but another road. In other words, there was railroad competition for the traffic at the two last named places, while there was none for the traffic at Duston. It appeared that defendant carried the traffic to and from the furnaces of Butlins and Islip, a greater mileage distance than it carried the same kind of traffic to and from those of Duston, for a less total per ton rate charge.

The question was whether this constituted an undue preference.

The Railway Commissioners having refused a restraining order, the case was appealed.

Lord Herschell, in an opinion sustaining the Commission, said (p. 236):

"This application is made under the 2nd section of the Railway and Canal Traffic Act, 1854, which provides that 'No railway company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, nor shall any such company subject any particular person or company, or particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever.' The question, therefore, which the tribunal, whether it be the Court or the Commissioners, before whom such a question comes, has to determine, is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage, as compared with the other.

"I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

"Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice. And it cannot be doubted that whether, in particular instances, there has been an undue or unreasonable prejudice, is a question of fact. * * *

(P. 237) "No rule is given to guide the Court or the tribunal in the determination of cases or applications made under the 2nd section. * * * (P. 238) I should say that the decision must be arrived at broadly and fairly, looking at all the circumstances of the case, that is, looking at all the circumstances which are proper to be looked at; because, of course, the very question in this

case is whether a particular circumstance ought or ought not to be considered; but, keeping in view all the circumstances which may legitimately be taken into consideration, then it becomes a mere question of fact. * * *

(P. 241) "Now, there is no doubt that in coming to that determination the Court below did have regard to the competition between the Midland and the London & North Western, and the situation of these two furnaces which rendered such competition inevitable. If the appellants can make out that, in point of law, that is a consideration which cannot be permitted to have any influence at all, that those circumstances must be rigidly excluded from consideration, that they are not circumstances legitimately to be considered, no doubt they establish that the Court below has erred in point of law. But it is necessary for them to go as far as that in order to make any way with this appeal, because once admit that to any extent, for any purpose, the question of competition can be allowed to enter in, whether the Court has given too much weight to it or too little, becomes a question of fact and not of law.

"The point is undoubtedly a very important one. * *

* (P. 242) Can we say that the local situation of one trader, as compared with another, which enables him, by having two competing routes to enforce upon the carrier by either of these routes a certain amount of compliance with his demands, which would be impossible if he did not enjoy that advantage, is not among the circumstances which may be taken into consideration? I am looking at the question now as between trader and trader. It is said that it is unfair to the trader who is nearer the market that he should not enjoy the full benefit of the advantage to be derived from his geographical situation at a point on the railway nearer the market than his fellow trader who trades at a point more distant; but I cannot see,

looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes, is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market. Why the local situation in regard to its proximity to the market is to be the only consideration to be taken into account in dealing with the question as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of the advantage which he derives from that favorable position of his works. All that I have to say is that I cannot find anything in the act which indicates that when you are left at large—for you are left at large—as to whether, as between two traders, the company is showing an undue and unreasonable preference to the one, as compared with the other, you are to leave that circumstance out of consideration any more than any other circumstance which would affect men's minds. * * *

(P. 244) "One class of cases unquestionably intended to be covered by the section is that in which traffic from a distance of a character which competes with the traffic nearer the market is charged low rates, because unless such low rates were charged it would not come into the market at all. It is certain, unless some such principle as that were adopted a large town would necessarily have its food supplies greatly raised in price. So that, although the object of the company is simply to get the traffic, the public have an interest in their getting the traffic and allowing the carriage at a rate which will render that

traffic possible, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situate nearer to it. * * *

(P. 245) "I cannot but think that a lower rate which is charged from a more distant point by reason of a competing route which exists thence, is one of the circumstances which may be taken into account under those provisions, and which would fall within the terms of the enactment. * * * Suppose that to insist on absolutely equal rates would practically exclude one of the two railways from the traffic, it is obvious that those members of the public who are in the neighborhood where they can have the benefit of this competition, would be prejudiced by any such proceedings. And further, inasmuch as competition undoubtedly tends to diminution of charge, and the charge of carriage is one which ultimately falls upon the consumer, it is obvious that the public have an interest in the proceedings under this act of Parliament not being so used as to destroy a traffic which can never be secured but by some such reduction of charge, and the destruction of which would be prejudicial to the public by tending to increase prices."

The situation of appellee and its competitors at Grand Rapids, in the relative distances of their stations from the tributary business of the place, is repeated in a greater or less degree in every large city in the United States where there are competing railroads. And in many instances a more favorable situation of one road in a city gives to it a very great advantage over its competitors for traffic of the place. The New York Central Railroad Company in New York is an illustration of this. Should the Erie Company and the West Shore Company be prevented from trying, by a free system of ferrying, to make good the physical disadvantage under which they labor in respect of New York City traffic? And is it to be held

that the West Shore Railroad Company must discontinue its system of ferriage between Weehawken and the city unless it maintains a like system for the accommodation of the relatively small traffic it carries to and from all the little rural towns that skirt its line on the east side of the Hudson River? The question here involved is no less broad than that.

IV.

My argument has proceeded thus far on the hypothesis of an actual discrimination existing in favor of Grand Rapids and against Ionia in the extra service rendered by the appellee at the former place. But I now submit that in the facts of the case, there is no basis for this claim. Broadly stated, I contend that there can be no discrimination, within the meaning of the act of Congress, by a carrier in the degree or extent of service it renders at one place beyond that rendered at another, where there is no competition of trade or business between the two places.

I have pointed out, and it appears as an admitted fact here, that the competition between Ionia and Grand Rapids is "but slight," and as I have said, this, in the law, is equivalent to none at all. *De minimis non curat lex.* To make a case of discrimination (unless an exception may be made under the provisions of sections 2 and 4), it must appear that somebody or some interest has been injured by the thing complained of, and injured not trivially, but materially and substantially. The law deals with neither abstractions nor trifles.

Under the English Railway and Canal Act, in the case of Lees and others vs. Lancashire, etc., Ry. Co. (1 R. & C.

T. Cases, 352), complaint was made that the railway company had been guilty of undue discrimination in delivering coal for a corporation at a certain station while refusing such delivery to the complainants at the same station. The Commission (p. 366) said: "But the preference given to the corporation was not *per se* a detriment to them (complainants). There was no competition of interest to make it so. The corporation did not sell coal." (It appeared that the complainants were coal vendors.)

In reference to the charge of discrimination against places by the grouping of rates, the Commission held, in the case of Howell, et al., vs. N. Y., L. E. & W. Ry. Co., et al., that whether such grouping constituted a violation of the act or not depended on whether actual injury to the complaining place resulted from it. And in the case of the Imperial Coal Company, 2 I. C. Repts., 436, the Commission held that actual undue prejudice or damage of which the rate is the cause must result to the more favorably situated producer to render a group rate unlawful. This just rule was for some reason disregarded by the Commission in our case, and the learned Circuit Judge who granted the decree failed to apply it.

The question of injury must necessarily be the test of the legality of the action of the respondent in rendering this cartage service at Grand Rapids.

In Hozier vs. Caledonian R. Co., 1 Ry. & C. T. Cases, 27 (Nev. & McN.), complaint was made, by one who frequently traveled, that passengers from an intermediate station between Glasgow and Edinburgh were charged a higher rate than was charged to through passengers between these places; but the court held that the complaining party had no interest in the matter. Referring to section 2 of the English act, which corresponds in its provisions to section 3 of our act, the court said: "It provides for giving undue preference to parties *pari passu*

in the matter, but you must bring them into competition in order to give them an interest to complain."

This case is referred to by Justice Brown, in Interstate Commerce Commission vs. Baltimore & Ohio R. Co. (145 U. S., 284), and after stating that the facts would amount to a violation of the fourth section of our act, he adds: "But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute.—McDonald vs. Hovey, 110 U. S., 619."

At this point I desire to briefly notice the opinion in this case of the learned Circuit Judge. He says:

"It is conceded that the contract of carriage of a railway common carrier, as usually understood, is the transportation of the goods from the warehouse of the railway at the point of shipment to the railway warehouse at the point of destination. Generally, the cartage from the railway warehouse to the storehouse of the consignee is paid by him."

Record, p. 81.

I do not know where this concession has been made in the record; and I do know that it would be exceedingly difficult to determine what percentage of the freight carried by railroad companies in this country is received by the carrier at the railway warehouse or delivered at its warehouse at the point of destination. There are no statistics on the subject. It is a notorious fact—and the record contains ample evidence of it, to which I have already referred—that railway companies throughout the country render a large amount of service at terminal and

other places on their lines of road, in the transportation of traffic between their stations and the places of business of shippers and consignees, by means of spur tracks laid for private use of shippers, and by cartage. It is believed that in the larger cities this practice is rather the rule than the exception.

Again, he says that the grouping of Grand Rapids and Ionia for rate purposes "is a conclusive admission that so far as the transportation from the east to the warehouses of the company at the two places is concerned, it is under substantially similar circumstances and conditions."

Record, p. 81.

I contend that this grouping involves no such admission. The same rate is made for shipments from the east to the two places, undoubtedly, but the rate on Grand Rapids traffic contemplates and involves the additional service of hauling the traffic from Ionia by rail, a distance of 32 miles, and its cartage there from the station to the city, a distance of 1¼ miles. The cartage is part of the transportation contemplated in the rate. The rate for the two places was made with express reference to this additional service at Grand Rapids, and it included the carting of the traffic just as much as it included the additional rail mileage. It is, as respects this question, the same as if appellee's road extended beyond its present station at Grand Rapids into the city, and Grand Rapids was, therefore, 33 1-3 miles, instead of 32 miles from Ionia.

Having found this "conclusive admission by defendant" that the transportation from the east to the warehouse of the company at Grand Rapids and Ionia is under substantially similar circumstances and conditions, he says: "The question remains, whether the conditions existing with reference to the delivery of goods from the ware-

houses to the storehouses of the consignees are such as to warrant a full charge for the same at Ionia, and no charge at all at Grand Rapids. If not, then the free cartage at Grand Rapids is in fact a reduction in the cost of transportation to Grand Rapids, and illegal."

And he concludes that, while a cartage service at Grand Rapids which would place the shippers at that station on an equal footing with those at Ionia, or in other words, would equalize the relations between shippers at the two places in respect of receiving goods, would be permissible, cartage delivery at Grand Rapids, while no carting service is given at Ionia, is unjustifiable. He adds: "Any benefit in relation to the shipment of goods having a definite money value, conferred gratis by the carrier upon one shipper, which is not conferred upon another, when the service to each is admittedly under substantially similar circumstances and conditions, is an undue reduction in the price of carriage to the former, and is illegal."

Record, p. 81.

Elsewhere, in the same opinion, he says: "If the railway company pays it (the cartage), the expense of transporting the goods to the place where he can use them is lessened by the cost of the cartage. This is generally exactly equivalent to the railway company's reducing the freight by as much as the cartage would cost the consignee. Now, it is admitted that this latter would be a violation of the long and short haul clause, if the reduction were made at Grand Rapids and not at Ionia. Why should not its exact equivalent, the furnishing of free cartage, be also a violation?"

Record, p. 81.

This is a mathematical view of the question.

The difficulty in applying mathematics here is that the

law has not yet reached the plane of an exact science. It has to deal with human relations and human affairs, and these, being not fixed but varying quantities, cannot be adjusted on mathematical lines.

The language of Lord Herschell in the Phipps case is very apropos here: "It is impossible to exercise a jurisdiction such as is conferred by this section, by any process of mere mathematical or arithmetical calculation. When you have a variety of circumstances, differing in the one case from the other, you cannot say that a difference of circumstances represents or is equivalent to such a fraction of a penny difference of charge in the one case as compared with the other. A much broader view has to be taken."

If it be true that the Grand Rapids cartage service is, in its benefit to the shipper, the equivalent, in its practical effect, to a reduction of the freight rate, the conclusion of the Circuit Judge is not warranted, for the reason which I have already suggested, namely, that the thing done is not within the prohibitive terms of either section 2 or section 4 of the statute, both of which he apparently holds have been violated. The practice did not involve a greater charge for the longer haul, for the greater charge was not, in fact, made, but identically the same charge. Nor was more charged to or received from the shippers at Ionia than was charged to or received from the shippers at Grand Rapids. It was simply a case, as I have said, of more service rendered at one place than at another, when the same freight rate maintained at both places. This is not only not prohibited by these sections of the act, but could not reasonably be in such terms. The criterion of unjust discrimination must, in justice, in such case, be a question of fact, to wit, whether the result is an undue preference or advantage; or in other words, whether any other interest is unduly prejudiced.

What appellee literally did was to render more service for the freight charge at one place than at the other. The learned judge, all through his opinion, erroneously treats this cartage service at Grand Rapids as rendered "*gratis;*" he calls it "free cartage." It is no more free cartage than the rail carriage from Ionia to Grand Rapids is free. The freight rate includes and pays for it.

The services of a carrier to its shippers who are given the same rate of charges are rarely, if ever, equal; and the additional service which one receives over the other is almost always capable of being reduced to "a definite money value." The record furnishes abundant illustration of this, and the members of this court have only to draw upon their own observation for facts in confirmation of it. As I have already pointed out, at every important station on every railroad in the United States are seen spur tracks of varying lengths running from the main tracks of the road to private industries, warehouses, etc., of shippers, which have been constructed and are maintained by the railway company. By means of these tracks the favored shippers ship and receive goods without the expense of cartage and double handling. This has "a definite money value" to them. And yet the learned judge is of the opinion, and correctly beyond doubt, that such discrimination is not necessarily a violation of the law. It seems to me to be equally clear that the other is not. The mathematical rule will not do. The money value test of the legality of the benefit conferred on one shipper or place over another, when the question is one of differing services rendered in carrying property, will not work. There must be some other test, and it is simply this: Whether the benefit conferred on the shipper or place amounts, in the language of section 3 of the act, to an "undue or unreasonable preference or advantage" as against other shippers or places. This

being always in each case a question of fact, the Court, in determining it, can, and should, consider all the circumstances and conditions touching the carrier's interests and the interests of the general public, as well as the particular interests of the complaining party, or locality.

The final test of "undue discrimination" in service which the opinion of the Circuit Judge gives—having reference, I assume, to section 3 of the act—is that it shall not be "such a departure from the usual facilities as to make it an obvious reduction in the cost of transportation to the shipper;" and he concludes that a cartage service at Grand Rapids that was not rendered at Ionia, which exactly made up for the greater distance between the former station and the shippers there than the distance between the Ionia station and its shippers, would be justifiable. He says: "It will fully equalize the conditions if the defendant furnishes cartage for a mile and a quarter at a price equal to that at which cartage for a quarter of a mile could be furnished without loss."

Record, p. 82.

Here, again, is the application of the mathematical rule which is simply an impracticable and impossible rule in such matters.

Cartage delivery at Grand Rapids, as I have shown, is a necessity to the railway company, resulting from its situation there—a condition of doing any considerable business at that place. According to this reasoning of the learned Circuit Judge, if the company had incurred the expense of building a large warehouse, equipped with agents and freight handlers, at some place within the City of Grand Rapids, at which all freight carried by it for that city was delivered by its carts or drays plying between its present railway terminus and the warehouse,

there would be no ground for complaint. Yet these carts or drays being once loaded, might without any appreciable added expense to the carrier, just as well make delivery at the warehouse of the consignee. The offense would seem to lie in the fact that the appellee has not incurred more expense itself and imposed more on the shipper at that place!

The apparent truth in all this matter is, the cartage being a legitimate part of the company's service of transportation, that delivery directly to the consignee is a simple incident, the natural result of economic management by the company. It has not been adopted as a device or scheme to defeat the act of Congress. That is not claimed. The practice has been in existence for more than a quarter of a century. It is, under the circumstances, an exactly parallel case to that stated by the learned judge, in illustration of the establishment by the carrier of its freight delivery station at one place so much nearer the business center than its delivery station at another place as to work a pecuniary saving to the shippers of the former as against the latter in receiving and delivering their goods; and this he concedes would not be a violation of the law. How would it benefit Ionia merchants to have the railway company adopt the warehouse plan above suggested in the business center of Grand Rapids?

V.

The remaining questions may be considered together, viz.: Assuming the cartage at Grand Rapids, which was not given at Ionia, to have been a violation of the law, was the order which the Interstate Commerce Commission made "a lawful order" within the meaning of section 16 of the act of Congress; and if not, had the Circuit Court power to modify it in the terms of the decree?

The interstate commerce act prohibits (a) discrimination between persons; (b) between places; (c) the payment of rebates as a method of discrimination; and (d) the charging of more for a short than for a long haul of traffic of similar character in the same direction.

The gist, and most emphatically the spirit, of these prohibitions is that when relief is granted by the Commission, the benefits and advantages given by the carrier to one person or place shall be given to the complaining person or place.

The keynote to the spirit of all these restrictions in respect of the remedy is found in the provision of the fourth section of the act. This is, that no more shall be charged for the shorter haul than is charged for the longer. The remedy where this provision has been violated is a reduction of the rate for the shorter haul, and not an increase of the rate for the longer haul.

The relief to be granted to complaining parties in all cases is that which will give them the advantage afforded to others, and in this spirit the law has been uniformly administered by the Commission down to the order made in this matter of Grand Rapids cartage.

Boards of Trade, etc., vs. C., M. & St. P. R. Co., 1 I. C. Repts., 608.

Providence Coal Co. vs. Providence & W. R. Co., 1 I. C. Repts., 368.

Re Chicago, St Paul & Kansas City R. Co., 2 I. C. Repts., 150.

When it appears that there has been an excessive rate exacted of the shippers of one place relative to the rate given to the shippers of another place, the remedy administered by the Commission has been not an advancement of the rate for the latter, but has uniformly been a reduction for the former.

The question is not affected by the fact that the Commission and the Circuit Court hold the effect of the cartage at Grand Rapids to be the equivalent of rebate payments. Even if this Court should agree with that view, it does not follow that the remedy under the statute should be the same as in the case of rebates. It clearly should not be the same.

The payment of rebates might undoubtedly be prohibited, for such payment is in terms specifically forbidden by the statute, and is, therefore, unlawful. And so, when the higher rate is charged for the lesser service, the order should be for its discontinuance.

A lower rate for Grand Rapids than for Ionia, in the absence of facts to justify it, would be a direct violation of section 4 of the act. If a literally lower schedule rate for Grand Rapids had been the actual thing complained of, the Commission would not have ordered the Grand Rapids rate advanced, but the Ionia rate reduced. It has not the power to do otherwise, as was expressly held in the case of the Chicago, St. Paul & Kansas City Ry.

The grievance here was that more service was rendered at Grand Rapids than at Ionia for the same rate charged, and that this greater service resulted to the pecuniary advantage of Grand Rapids shippers over the shippers of Ionia. The *gravamen* of the complaint, therefore, was dis-

crimination in this. It was not alleged, as it could not be truthfully, that the cartage at Grand Rapids was in itself illegal. Carting at a station by a Michigan railroad company is, as I have shown, quite as legitimate as hauling traffic over its railroad by steam power. The Congress of the United States is as powerless to prevent the one as the other. Its power is limited to the regulation of this business in respect of interstate traffic; the interstate commerce act attempts nothing more.

Now, under such a complaint as that of Stone & Carten, and within the terms of the law, what order could the Commission lawfully make? It is only a "lawful order" of the Commission that the court is given power to enforce.

I affirm that the Commission could no more prohibit carting at Grand Rapids than it could prohibit track delivery at that station, and that it was equally powerless under the law to compel a specific charge to be made for the carting. It had power to require the same service to be rendered at Ionia as a condition of its continuance at Grand Rapids, but nothing more. The complaint justified no other order, and the law, in the facts of this case, warrants no other. A complaint of discrimination in anything that is not expressly and specifically prohibited by the law, authorizes only one order, namely, that the same service or benefits be granted to the party or place complaining. The law leaves the carrier free, within this limit, to conduct its business in its own chosen way.

Such is my theory of the interstate commerce act, and such I believe to be the theory on which it has been hitherto administered by the Commission and the courts, until this case arose.

I therefore insist that the order of the Commission which unconditionally prohibited carting at Grand Rapids, unless a specific and separate charge should be made

for it, was not a "lawful order," or, in other words, such an order as it was within the power of the Commission to make.

Judge Cooley, in his opinion respecting the question raised by the complaint of Stone & Carten, said:

"In disposing of this case, it is proper to say at the outset that the complaint made of the respondent is not that it gives free cartage between its warehouse and the places of business of the patrons of its road at Grand Rapids, for it is not pretended that this of itself would be illegal. The complaint is that the free cartage is given to the patrons of the road at Grand Rapids, and a like service is not rendered on similar consignments to the patrons of the road at Ionia, though the latter are charged the same rates on the traffic. This, it is claimed, is unlawful."

3 I. C. R., 62.

In face of the indisputable and lawful right of the appellee, under its charter and the laws of Michigan, to transport traffic to and from its stations by carts and horse power, and in face of the equally indisputable fact that this method of handling traffic is not only not prohibited by the act of Congress, but that Congress does not possess the power to prohibit it, the order of the Interstate Commerce Commission unconditionally forbidding "free cartage" at Grand Rapids should not, I submit, be judicially sustained.

If the Interstate Commerce Commission, or a court, has the power to so direct at Grand Rapids station, it has the power to do so for all the stations on appellee's line of road. And further than this, it must, by the same course of reasoning, be held to have the power to determine what specific compensation a carrier shall charge for

this cartage service. In other words, the contention amounts to this: That a railway carrier engaged in interstate commerce is not at liberty, under the law, to make cartage delivery to and from its stations in consideration of the tariff charges it receives for carrying the traffic over its road to the place of delivery.

Surely, there is no warrant for this in the provisions of the act of Congress. How the business of the carrier shall be conducted, whether transportation shall be by steam, electricity, or horse power, or partly by one and partly by the other, how its charges shall be distributed or laid with reference to the aggregate or detailed service it renders the shippers, are matters with which Congress has no concern, and the statute does not profess to deal.

Let it not be overlooked that there was no question raised in the complaint before the Commission about the legal propriety of the appellee's having grouped Grand Rapids and Ionia for rate purposes. This was not objected to by the complaining parties, and the Commission did not criticise it, but treated it as proper and just.

Charging more for a short than for a long haul, under the conditions named in the statute, and the payment of rebates, are expressly declared to be "unjust discrimination." Other methods of conducting the business may amount to unjust discrimination, and where so are prohibited; but the rule of the statute is that, excepting as to the things specifically forbidden, what the carrier does for one shipper or place, he must, when an undue or unreasonable preference would otherwise result, do for others similarly situated. The remedy is to compel this, not to prohibit the thing which is in itself lawful from being done.

If the order of the Commission was not a "lawful order," or, in other words, such an order as it had power to make under the statute, then I contend that the decree, in modification of the order, was not within the power of the court, and that the judgment of the Court of Appeals should be affirmed.

On the other hand, if the Court should be of the opinion that the order of the Commission was a lawful order, and that it was warranted by the facts, I desire to waive objection to the decree of the Circuit Court.

The jurisdiction conferred on the Circuit Courts in such cases is special and their power in the premises is specifically defined. Section 16 of the interstate commerce act, which gives the jurisdiction and prescribes the methods of procedure, provides that "if it be made to appear to such Court, on such hearing, * * * that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such Court to issue a writ of injunction or other proper proceeding, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same."

In reference to that part of the decree which requires that the schedules of rates published and posted by the appellee shall show that cartage service is rendered at Grand Rapids and Ionia, I desire only to say, (1st) that the omission of this from the schedules was not in the complaint before the Commission, and that no violation

of the law in this regard was found by the Commission, or required by its order to be corrected; and (2nd) that the cartage service at Grand Rapids does not in the slightest degree modify or affect the aggregate charges for transportation. The rate continues the same, whether carting is done or not. The cost of cartage is neither deducted nor added. Therefore, the provision of the sixth section of the act, requiring a statement in the schedules of terminal charges, etc., does not apply.

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SUPPLEMENT.

The foregoing brief was prepared without the benefit of a copy of the brief of appellant. It has been slightly changed and reprinted since.

The contentions of the brief are:

1st. That the alleged offense of appellee—as stated in the complaint before the Commission, as embodied in the report of facts, etc., by the Commission, and as set forth in the petition of the Commission to the Court for enforcement of its order—was, that, in addition to the rail transportation of traffic between eastern points and Grand Rapids, cartage was furnished between the shipper's place of business at Grand Rapids and appellee's station, in consideration of the through rate of freight charge, while at Ionia this cartage was not afforded, although the same freight charge for traffic between that place and the same eastern points was made.

2d. That the cartage service rendered at Grand

Rapids, even if found to be discriminatory against Ionia, was not within the inhibitions of either section 2 or section 4 of the Act, for the reason that these sections are directed and limited to the certain specific abuses named therein, in which such cartage service is not included.

3d. That, if cartage at Grand Rapids is held to be within either section 2 or section 4, or both, then the circumstances and conditions at Grand Rapids, in respect of appellee, are so dissimilar to those at Ionia as to afford a complete justification for the discrimination involved.

4th. That the Grand Rapids cartage, if under condemnation of the Act at all, must be tried by the provisions of section 3 only; and that it was not an offense under section 3, because the cartage did not give an "undue or unreasonable preference or advantage" to Grand Rapids over Ionia, nor subject Ionia to an "undue or unreasonable prejudice or disadvantage."

5th. That there is no competing interest between Grand Rapids and Ionia, and that substantial competition in trade or business is a condition of the right of any locality to complain of favors which are granted to another locality, but withheld from it.

6th. That the order made by the Commission on its report of facts and conclusions of law as to the offense, was not a "lawful order," or such an order as the Act contemplates or authorizes in such circumstances.

7th. That the question of what the Grand Rapids schedules showed, or should show, in respect of the cartage service there, was not before the circuit court or the appellate court, was not within the issue made by the pleadings, and is not before this court for its consideration.

I.

Following the order of appellant's brief, in this reply the question of the Grand Rapids schedules comes first.

Whatever power the Commission may have to extend its investigations beyond the specific matters or grievances embodied in the complaint, the sphere of the circuit court's inquiry on petition brought by the Commission to enforce obedience to its order, must be confined to the issue made by the pleadings, as in any other equity suit.

Jurisdiction, in such case, of the circuit courts of the United States, sitting as courts of equity, is conferred by section 16 of the Interstate Commerce Act.

The section provides that when a carrier has refused to obey the "lawful order" of the Commission, that body may "apply, in a summary way, by petition," to the court, "alleging such violation or disobedience, as the case may be;" and that the court "shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power * * * to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition."

It then provides that the finding of fact in the report of the Commission shall be *prima facie* evidence of the matters therein stated, thus leaving it open for the carrier to contest the facts found by the Commission.

The provisions of this section evidently contemplate

that the petition of the Commission will state the facts on which the order was based, and the order itself. It may be that additional facts might be stated in support of the order, but, if so, it was not done in this case.

An answer by the defendant, and therefore an issue to be tried, is also evidently contemplated.

The petition in this case was framed on this theory. The complaint of Stone & Carten is alleged, and a copy of it attached as "a part of the petition."

Record, p. 1.

Appellee's answer to the complaint is alleged, and a copy of it is attached to the petition.

Record, p. 2.

The report of the Commission of its finding of fact and conclusions of law, together with its order in the matter, is also set up and copies attached as part of the petition.

Record, p. 2.

The petition contains no allegation of fact not embodied in the Commission's report.

On reference to the complaint of Stone & Carten (Rec., pp. 4 and 5), it will be seen that it contains no allegation of any defect or omission in the Grand Rapids schedules.

The report of the Commission (Rec., p. 9), is equally barren of any statement on the point.

Appellant's brief (p. 23) says: "The Commission correctly held this free cartage to be a violation of the sixth section"—referring to the omission from Grand Rapids schedules of a notation of the fact of cartage.

On the contrary, I affirm that the Commission did not so hold at all.

Record, pp. 11-16.

The report of the Commission says (Rec., pp. 12-13): "In disposing of this case it is proper to say at the outset, that the complaint made of the respondent is not that it gives free cartage between its warehouse and the places of business of the patrons of its road at Grand Rapids, for it is not pretended that this of itself would be illegal. The complaint is that the free cartage is given to the patrons of the road at Grand Rapids, and a like service is not rendered on similar consignments to the patrons of the road at Ionia, though the latter are charged the same rates on the traffic. This, it is claimed, is unlawful:

"First. Because to render such service at Grand Rapids is equivalent in law to granting to its patrons a special rate, or rebate equal to the cost of cartage.

"Second. Because the performance of this service gives to the Grand Rapids dealers an undue and unreasonable preference and advantage.

"Third. Because the respondent exacts a greater compensation for the transportation of a like kind of property from eastern cities to Ionia, a shorter distance, than from the same cities to Grand Rapids, a longer distance, over the same line and in the same direction, the shorter being included within the longer distance and the *circumstances of carriage* being substantially similar."

And the report immediately adds:

"This is the complaint; and, as thus summarized, it presents allegations of three distinct violations of law, all shown by the same state of facts."

The foregoing is a statement of the case before the Commission as that body *at that time* understood *it*.

If the Grand Rapids schedules were defective, the Commission did not embody the fact in the report, and did not treat the matter as before it.

Appellant's brief (p. 23) says the schedules "were

originally *incorporated* in the opinion of the Commissioners;" and reference is made to page 11 of the record in support of the statement. On turning to page 11, we find that a copy of the stipulation of facts which was filed with the Commission was embodied in its report; and at the end of paragraph 3 are the words, "a copy of which schedule or tariff is hereto annexed and made and deemed a part of this stipulation."

It is more than doubtful whether the schedules ever were attached—it is probable that they were not. The Commission had them, as they have copies of all schedules relating to interstate traffic. But it is evident that they played no part in the proceedings—either before the Commission or subsequently in the case in court —beyond establishing the fact alleged in the Stone & Carten complaint that the rates shown in them were the same for Grand Rapids as for Ionia. And it is furthermore apparent, from the averments of the complaint of Stone & Carten and from the report of the Commission, that this was the sole purpose of referring to them.

(a) The case made by the complaint of Stone & Carten to the Commission was not one of defective schedules, but of cartage at Grand Rapids which was not afforded at Ionia. It was a case of discrimination at Grand Rapids against Ionia.

(b) The Commission did not find that the schedule of rates for Grand Rapids was defective, and there was no additional testimony to the point in the case in court.

(c) The order of the Commission did not go to the schedules, but to the cartage. The cartage was to cease, not the schedules to be corrected.

That the Commission knows the difference between a case of defective schedules and the case of discrimination between places, and makes a distinction between them, is

rendered apparent by reference to the order made in the Baltimore & Ohio case. The order there required the company to "print, post and file schedules showing the rates, fares and charges * * * for round-trip passenger excursion tickets," etc.

Interstate Commerce Commission vs. Baltimore & O. R. R., 43 Fed. Rep., 39.

(d) The case made by the Commission in the Circuit Court, and which is now before this court, is one between Grand Rapids and Ionia, of discrimination in favor of the former place against the latter.

(e) The question of Grand Rapids schedules is one in which the citizens of Grand Rapids might be interested, but not those of Ionia.

It may be important to the Commission to have a judicial construction of this feature of the sixth section of the Act, and I have not the slightest objection to its securing it, even in this case, as an abstract question. But I do most seriously object to having it treated as material in the disposition of this case. Appellee's claim of the right to continue the cartage service at Grand Rapids is—as the history of the case disclosed in the record shows that it has been hitherto from the beginning of this protracted contest—the only essential matter involved.

This case should not now be disposed of as a question of form—which this schedule matter in this case is. The schedules, if defective, can be easily amended, as, if that had been the gist of the offense alleged, they no doubt would have been at the bare suggestion of the Commission.

I submit that the schedule question is not here. The effort to introduce it indicates a want of confidence of the Commission in the case it decided and subsequently made

in court, and which has since been tried and decided by the circuit and appellate courts.

If I am right in this position, the contention in appellant's brief that the schedule rates required to be shown by section 6 are the rates from station to station is wasted in this connection.

But is it true? I submit that it is not in reference to a case like this. Where the carrier's practice is to receive and deliver uniformly for all, at some other place or places than its own station, either by a system of belt railroad or by any other lawful means, for a definite gross freight charge per hundred-weight from the point of shipment to the place of delivery, it was not the purpose of this section to require the schedule to show anything beyond the rate.

There are no terminal charges or rules and regulations here that affect or determine the schedule rate. The rules and regulations contemplated by this section are, for instance, such as impose an additional charge for special delivery on private sidings of consignees, or an extra charge for delay in unloading and removing the contents of cars placed for track delivery, etc.

II.

It is contended in appellant's brief that the interpretation given by the Commission to the words, "under substantially similar circumstances and conditions," found in sections 2 and 4,—namely, that they include only whatever affects the cost of the service to the carrier—is correct; and it is argued that the remoteness of appellee's station from the business at Grand Rapids, and the other conditions shown in the record and relied upon to justify the cartage service, should not, as matter of law, be considered. This was the ruling of the Commission. It excluded any consideration of these facts set up and relied upon by appellee, as immaterial, on the ground that they did not affect the cost of the transportation.

I have assumed in my brief that this court settled that question against the contention of appellant in the Texas & Pacific R. R. case.

I find nothing in this new presentation of the Commission's view, respecting the words under consideration, to create a doubt of the correctness of this court's interpretation of them in that case.

The case of the Cincinnati, New Orleans & Texas Pacific Ry. Co. vs. I. C. C. (162 U. S., 184) is cited in support of the Commission's interpretation of these words. And yet, in that case, this court said (p. 193): "It was within the *jurisdiction of the Commission to consider whether the said company*, in charging a higher rate for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, *was or was not transporting property in transit between States under substantially similar circumstances and conditions.*"

The court adds (p. 194): "But the question was one of fact, peculiarly within the province of the Commission, whose conclusions have been accepted and approved by the circuit court of appeals, and we find nothing in the record to make it our duty to draw a different conclusion."

One of the questions in that case was whether a rate of $1.07, from Cincinnati to Atlanta, was excessive relatively to a rate of 89 cents from Cincinnati to Birmingham, the distance in both cases being about the same. The company justified this lower rate to Birmingham by showing that a competing road at that place had made the rate and thereby forced the company to adopt it.

The showing of this competition was not made at the hearing before the Commission, but was embodied in the answer to the Commission's petition in the circuit court, and maintained by proof. The fact would not have availed the company before the Commission if it had appeared, for the Commission's interpretation of the words, "under substantially similar circumstances and conditions," excludes such consideration. It substantially so said in that case: "There is apparently nothing in the *nature and character of the service* to justify such difference," was its language.

The circuit court and the court of appeals apparently held that the Birmingham competition sufficiently explained the lower rate to that place from Cincinnati, and therefore concluded that the rate to Atlanta was not unreasonable in comparison.

This court said, in reference to the point, "As both courts found the existing rates to have been reasonable, we do not feel disposed to review their finding on that matter of fact."

If the Commission, in our case, had considered the facts constituting the alleged dissimilarity of circumstances

and conditions, and had held, as matter of fact, that they did not warrant the discrimination, the judgment of this court in the Social Circle case might, with some show of reason, be claimed to be adverse to our contention. But such was not the fact.

It is true that the facts were considered by the circuit court and the conclusion reached that the cartage at Grand Rapids was discriminatory against Ionia. But this was accomplished by a process of reasoning by the learned circuit judge which I have endeavored, in the principal brief, to show was erroneous, and furthermore, in utter disregard of the uncontroverted fact that no interest of Ionia or of its people was prejudiced by it.

The circuit court of appeals also considered the facts, but arrived at the opposite conclusion from that of the court below.

While this court may defer to the judgment of the Commission on the facts in certain cases, considering the expert character of that body, and especially when that judgment has been ratified by the lower court, it is not conceivable that such deference can be paid to the judgment of a circuit court. This is an equity case; the judgment of the court below on the facts, as well as the law, is under review here.

In reference to the question of whether the facts shown in justification of the cartage, constitute such dissimilar circumstances and conditions as to relieve appellee from offense under the law, and in answer to appellant's argument on this feature of the case, I quote the following from the opinion of Judge Hammond in this case in the circuit court of appeals. The opinion is embodied at length in the record:

"We cannot say that a railroad company exercising that

freedom in the conduct of its own business which is still left to it, notwithstanding the regulations of the interstate commerce act, may not reasonably and without undue preference or advantage and without unlawful discrimination, collect and deliver at its own expense goods at one locality and not at another where there is such a dissimilarity of population and traffic tonnage as we have here, so long as its aggregate compensation for the whole service is not greater for the shorter than the longer haul, but is exactly equal.

"But the leading, most important and controlling feature of the situation at Grand Rapids, as shown by the proof, is the fact that the railroad company terminates its rails at a point relatively far distant from the business sections of the city. This condition was first established twenty-five years ago for reasons that do not clearly appear from the proof, but which may be inferred to be largely those arising out of considerations of economy.

* * * * * * * * * *

Taking the interests of the public at Grand Rapids and looking at it as an established and familiar business convenience and a habit to which they have long been accustomed, it becomes manifest that the carrier could not abandon it voluntarily or by coercion without creating that dissatisfaction and prejudice against itself which would have a natural tendency to drive away its customers and lessen its revenues, and being of that separable character and outside transaction which we have shown it to be, it may well be doubted if Congress had any intention—if it had the power—to deprive a carrier of such an appliance by imposing upon it the necessity of either abandoning it or the establishment of similar appliances at all other places on its road; for it comes to this, that if this company must afford cartage facilities to its customers at Ionia, it must do so at all other sta-

tions. If Congress had knowledge, as we must presume it had, of the existence of such an instrumentality among the appliances of railroad companies, any intention to discontinue it should be made manifest by more direct language than we have in this act, and not dependent solely on implications to be drawn from it. While no railroad company should be allowed to use any of its appliances for the purpose of making unjust discriminations or undue preferences in evasion of an act designed to secure just and fair dealing, the long-continued existence of such a custom as we have here may well be regarded as one of the 'circumstances,' if not 'conditions,' mentioned everywhere in the act as elements which are to enter into the decision of the question of unjust and unfair discrimination, and it may well be argued that it is unjust and unfair to the people at Grand Rapids to deprive them in the name of the qualified equality which the act establishes of this long-used custom of convenience. * * * * * * * * * We think that the consequences of the deprivation to the people of Grand Rapids of this custom may be held to be one of the circumstances which may relieve a carrier from the statutory obligation of equal facilities elsewhere, to say nothing of injury to itself. There having been no such long-established custom at Ionia, and their station having been located much nearer to the business portion of the town than at Grand Rapids, exhibits a dissimilarity of circumstances between the two places.

"Another condition or circumstance is, that having so long ago adopted this plan of accessorial service and adjusted its terminal facilities at Grand Rapids to that plan, to now abandon it and in lieu thereof project its lines of rails and new station appliances into the traffic centers of the city would entail upon the carrier an enor-

mous cost for rights of way and other necessaries of construction and reconstruction. * * * * * * *

"Finally, we have a circumstance, not more important than those to which we have adverted but more striking in its appearance of importance, and that is the competition of rival carriers at Grand Rapids for the same traffic. It needs nothing more than the mere suggestion of the facts themselves to display the disadvantage there would be to this company if it remained with its station houses in the suburbs of Grand Rapids without the privilege of collecting and delivering by carts, while its rivals had station houses located immediately in the business center of the city. It does not then become a matter of competition and business rivalry, but substantially of the annihilation of the business of this company at that point. Or, more intolerably, a denial to this company of the right to compete with its rivals as now it may. Its only possible remedy would be the building of its tracks into the city at the cost we have suggested. There is no such condition or circumstance as this at Ionia. * * * It is the circumstance of greater distance, not measured by the cost of cartage as between the shorter and longer distance, but measured by the enormous cost there would be to this carrier to put its station house as close to its customers at Grand Rapids as its station house at Ionia is to its shippers there and as close as those of its rivals. In other words, this carrier has so favorably located its station house at Ionia that it is as close to the shippers there as any station house of its rivals at Grand Rapids is to the shippers at that place, and Ionia merchants, being in shortness of cartage distance as close to its station house as the most favorably situated shippers at Grand Rapids to any railway station available to them, should not complain, since they have each quite equal facilities to railway stations, from which their goods may go or

come in the general traffic eastward. But this carrier, being at Grand Rapids farther away from all shippers there than it is from those at Ionia, can not reduce this distance to equal advantage for both places without the enormous cost to which we have referred. It is therefore apparent from the proof that it is cheaper for the respondent to collect and deliver its goods at Grand Rapids by carts than to put itself nearer the premises of the shippers at that place, and thereby make cartage as insignificant or cheap or as nearly so as at Ionia, or rather as little obstructive to the object of getting business as at Ionia. The dissimilarity between the two is that this particular carrier is farther away from Grand Rapids than Ionia, not in the sense of simple distance, but in that of the cost of getting nearer. Wherefore the identity of cartage cost per hundredweight mentioned in the proof is not the essence of this situation, but the cost of substitution. If it were a mere question of miles or quarters of a mile, this dissimilarity would not be so important; but when we take into consideration the cost of other methods of accessorial service to this company at Grand Rapids, the dissimilarity becomes at once formidable, and, standing by itself would possibly be enough to control the decision in this case."

Record, pp. 116, 117, 118, 119.

"The statute can not be violated merely to get traffic from a rival by giving lesser rates than to people more favorably situated; can not bleed Ionia to make up for the misfortunes of competition at Grand Rapids, for Congress has prohibited such a practice; but it has not prohibited the carrier from resorting to a cheaper method of securing access at Grand Rapids than one more costly. It has not prohibited this company from entering into competition

with its rivals by some mode of access to shippers at Grand Rapids; and why not this mode? It has not been prohibited from extending its lines and placing its station houses alongside of those of its rivals; and why should it be prohibited from sending its carts there?"

Record, p. 119.

"The whole of these dissimilarities of condition and circumstance as between Grand Rapids and Ionia, whether of competition or what not, may in our view be summed up in the statement that this particular carrier can not have access to the traffic at Grand Rapids without this cartage service that is complained of by Ionia, while at that station it can have access to the relatively insignificant traffic there given to the carrier without it. But for the rival lines at Grand Rapids the carrier might force the expense of the inconvenience of the location of the station house on shippers there just as in thousands of localities it is enforced on shippers who must cart their goods sometimes ten or twenty miles, or even more in some places, to reach the nearest railway station; but in this instance, because of these nearer tracks, the shippers can not be forced to incur this expense, and this condition or circumstance compels the carrier to supply the access which it does supply as cheaply to itself as possible; and any interpretation which prohibits it from doing this in the cheapest way is an unjust discrimination in the "regulation of commerce" against this particular carrier, if not unlawful, and can not be any less unjust and unlawful than it would be if the prohibition extended to an injunction forbidding the carrier to build its lines and station houses as close to the shippers at Grand Rapids as those of its rivals. If it did this, confessedly it might, by grouping, charge an equal rate with Ionia, although that is the

shorter haul and would by such extension be still shorter. Hence we do not see why they may not just as lawfully charge an equal rate if the access at Grand Rapids be had by carts rather than by extended lines of rails. Surely if the rails were extended and an equal rate were charged, Ionia could not demand that a mathematical calculation should be had of the exact cost of the new access and an aliquot part of the equal rate be deducted in order to make a showing of the larger charge for the shorter haul. What Ionia really demands is that she shall be allowed to impose an additional burden upon the carrier by taking advantage of appearances in this matter which ignore the inconvenient and distressful location of its station house at Grand Rapids, while its own station house is as conveniently located in that respect as any station house could well be. There is no reason why the defendant company should be thus forced to build its lines into the city to secure its railway traffic."

Record, p. 120.

I have considered and fully discussed the facts which are relied on in justification of this cartage practice at Grand Rapids, in the foregoing brief, beginning at page 27 and extending to page 44. I will not repeat what I have there said, nor do I care to here make any extended additions to it.

But there are some things suggested and urged in appellant's brief which require to be noticed.

It is said that there is also competition at Ionia. This is true. This court may take judicial notice of the fact. But, if so, it must likewise take judicial notice of the further fact that the stations of the competing carriers

there are side by side, or nearly so, and equally accessible to the traffic of the place.

The competition at Grand Rapids must be considered in connection with the disadvantageous situation of appellee in reference to the traffic as compared with its rivals. This difference in situation is the gist of the matter.

The suggestion in the brief that the motive of appellee for doing this cartage at Grand Rapids may be to underbid its rivals in rates for the entire traffic at Grand Rapids, or for traffic of shippers who have siding connections with the main track of the rival roads, has nothing in the record to support it. In answer, if I may also indulge suggestion, I would ask whether it is supposable that the four (there are four, in fact) other rival roads at Grand Rapids have suffered the appellee to do this carting there without equalizing the benefit of it to their shippers by allowing to them the cost of cartage? These rival carriers of appellee may safely be left to protect their own interest in this matter. Appellant's success in this controversy would unquestionably prove a great gain to these rival carriers, who, as suggested by Commissioner Bragg, are the sole promoters of this protracted litigation. They have a strong motive for wanting this cartage by appellee to cease.

But an allowance by the rival companies of the actual cost of the cartage to the shippers, only places those companies on a par with appellee, in respect of the Grand Rapids traffic, and it leaves appellee free to make its position there in respect of competitive traffic, equal to that of its rivals by this cartage practice.

The suggestion in appellant's brief that the courts should confine themselves to a review of the Commission's decisions on questions of law, and thereby practically vest that body with judicial power, which, if attempted to be done directly by an act of Congress, would be declared unconstitutional by this court, hardly merits serious discussion.

III.

In reference to the modification of the order of the Commission by the circuit court, in its decree, appellant's brief says:

"The Commission directed the appellee to stop free cartage at Grand Rapids 'whereby' the sixth and fourth sections were violated."

I have not so understood the order, and it is quite evident that the circuit court did not so understand it.

The order was, "To wholly cease and desist from furnishing free cartage of freights at Grand Rapids, * * * whereby *rebates* from its lawful published schedule of rates, fares, and charges, at its station or office in Grand Rapids are given to shippers and consignees, and charges for the transportation over its line of property shipped from eastern points * * * are made less than charges for the transportation over its line of like kinds of property shipped from the same eastern points to Ionia."

Note that while there is no mention here of any section of the law, the offenses stated in the order are those spe-

cifically created by sections two and four, and not that created by section six.

The force and operative effect of the order were upon the cartage, which was to cease; all that follows answered no purpose and played no part, except to embody the reasons of the Commission for the order. This, I submit, is clear.

Now, the circuit court gets its jurisdiction from the sixteenth section of the Interstate Commerce Act, and it has such powers in the premises—and such only—as are there conferred, either directly or by necessary implication.

It is said that our contention ignores the provision of the section, that the court "shall hear and determine the matter speedily as a court of equity," and "in such manner as to do justice in the premises."

On a careful reading of this section of the Act, it will be perceived that the words last quoted have sole reference to matters of pleading and proceedings, that they do not relate to the powers of the court in respect of its final decree.

And in regard to the words first quoted, they are no more directed to the power of the court in respect of its decree than are the others. They simply affirm in what character the court shall hear and determine the case, namely, in the character of a court of equity.

But what "matter" is it that the court is to "hear and determine as a court of equity?"

This is answered by the following provision of the section: "And if it be made to appear to such court, on such hearing or on report of any such person or persons, *that the lawful order or requirement* of said Commission drawn in question has been violated or disobeyed, it shall be lawful for the court to issue a writ of injunction," etc.

Can anything be clearer than that the power of the

court is by this language limited to the enforcement of the order of the Commission?

It might be convenient, and perhaps would have been better, to have the court vested with all the power that appellant now contends for. I express no opinion about that. But I confidently affirm that such measure of power has not been granted.

The section authorizes the Commission to bring its suit for enforcement of any "lawful order" it may have made which is disobeyed, and gives the court, "sitting as a court of equity," power to enforce such order.

The power and duty are cast upon the court to determine whether the order it is asked to enforce is or is not a "lawful order."

The judicial function of the circuit court in its final decree is rigidly limited to that by this act. The case made by the petition relates to that and can relate to nothing else. The only issue of fact or of law going to the merits of the case, which can be raised in the pleadings, is that. The test of materiality of all testimony offered in the court is that.

If I am right in this it follows that the decree of the circuit court was erroneous, and that the circuit court of appeals correctly so held.

That the order of the Commission was not such an order as the facts found by it and the law applicable thereto warrants, I have attempted to show under Paragraph V. of the brief.

I may repeat here, what I have said in my brief, that if this court shall be of the opinion that the order of the Commission was a "lawful order," I desire to waive the foregoing objection to the decree.

E. W. MEDDAUGH,
For Appellee.